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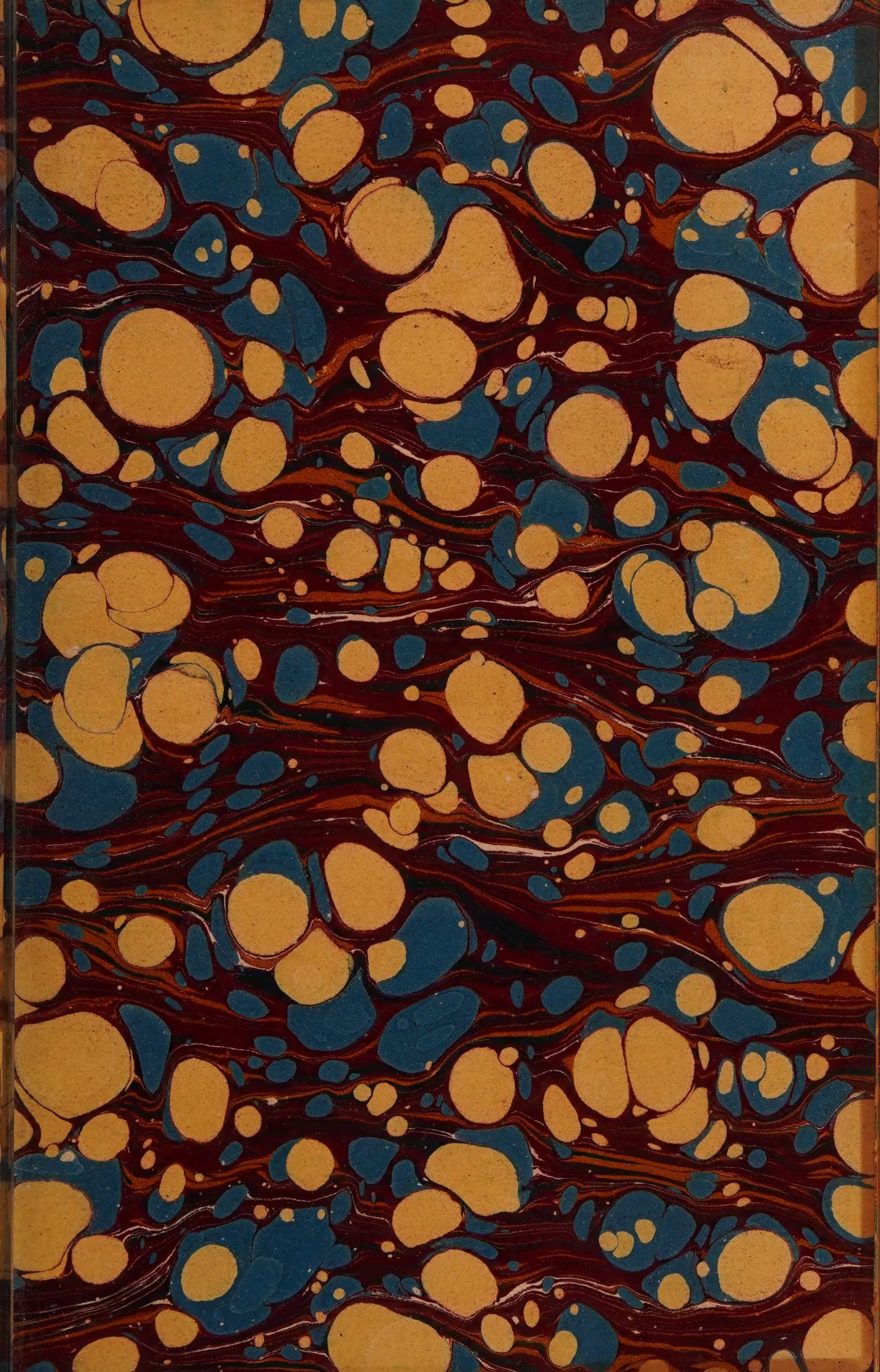

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THE

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COURTS OF PROBATE, DIVORCE, AND ADMIRALTY,

AND ON APPEAL THEREFROM IN THE

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ALSO DECISIONS IN THE

ECCLESIASTICAL COURTS.

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JUDGES

OF

THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE.

1898.

The Right Hon. Sir Francis Henry Jeune, Knt., President.

The Hon. Sir John Gorell Barnes, Knt.

JUDGES

OF

THE COURT OF APPEAL.

1898.

Earl of HALSBURY, Lord Chancellor.

Lord RUSSELL of Killowen, Lord Chief Justice of England.

Sir NATHANIEL LINDLEY, Master of the Rolls.

Sir FRANCIS HENRY JEUNE, President of the Probate, Divorce and Admiralty Division.

Sir ARCHIBALD LEVIN SMITH,
Sir JOHN RIGBY,
Sir J. W. CHITTY,
Sir RICHARD HENN COLLINS,
Sir ROLAND VAUGHAN WILLIAMS,

} Ordinary Judges of Court of Appeal.

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CASES

DETERMINED BY THE

PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

1897. 1898.

THE CHIOGGIA.

1897
Oct. 26;
Nov. 8.

Admiralty—Bottomry—Necessaries—Marshalling Assets.

Although the proceeds of ship and freight would be exhausted by the holders of a bottomry bond on ship, freight, and cargo, the Court refused to marshal the assets in favour of a claim for necessaries against ship and freight, on the ground that, the owners of ship and freight being different persons from the owners of cargo, third parties, namely, the cargo owners, would be prejudiced by being, in effect, made to pay the claim of the necessaries men with which they had no concern.

The Edward Oliver, (1867) L. R. 1 A. & E. 379, distinguished.

MOTION by plaintiffs, holders of a bottomry bond on ship, freight, and cargo, for payment out of court to them of the net proceeds of ship and freight, in priority to interveners seeking the aid of the Court to marshal the assets in order that their claim for necessaries against ship and freight might be satisfied.

The material facts were shortly as follows :—

In January and April, 1896, the Goole Ropery and Ship

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Chandlery Company, Limited, and Leatham, Tew & Co., on the order of her master, supplied the Italian barque *Chioggia*, at the port of Goole, with certain necessaries. On April 9, 1897, the *Chioggia*, then being in distress at the port of St. George in the islands of Bermuda, in the course of a voyage from Demerara to Liverpool with a cargo of timber, her master borrowed 1581*l.* 12*s.* 6*d.* of a banker of Hamilton, binding himself, and hypothecating the ship, freight, and cargo, for the repayment of the sum, with a maritime premium of 20 per cent. within three days after arrival at Liverpool.

The bond was assigned to the secretary of the association for the protection of commercial interests, known as the London Salvage Association.

On May 29 the vessel arrived at Liverpool. On June 1 a writ in rem was issued by the assignees of the bond against the owners of the *Chioggia*, her cargo and freight. On the same day a writ in rem was issued by the necessaries men against the owners of the *Chioggia* and her freight. The owners of the vessel not appearing, on June 4 an order was made in the bondholders' action by which those plaintiffs were to be at liberty to pay the wages and other amounts legally due to the crew (other than the master), and in respect of such payments they were to have the rights the crew would have had, and the cargo owners were directed, after deducting pilotage, towage in, boatmen, reporting inwards, dock dues, light dues, and the cost of discharging, to pay the balance of freight into court. On July 12 a decree was made in the same action, which, whilst reserving all questions of priority, pronounced for the validity of the bond, and the ship was appraised and sold by order of the Court, realizing, after deducting the marshal's expenses, 204*l.* 12*s.*, which, with the balance of freight, 372*l.* 4*s.* 10*d.*, made the proceeds in court 576*l.* 16*s.* 10*d.* By arrangement the cargo was not arrested, but the value agreed at, 2052*l.* 10*s.* 9*d.*, making a total fund of 2629*l.* 7*s.* 7*d.*, against which the plaintiff bondholders claimed to reimburse themselves in respect of 106*l.* 8*s.* 8*d.* wages paid to the crew of the *Chioggia*, 101*l.* wages and costs payable to her master, 10*l.* 1*s.* 8*d.* paid to the Italian consul as the contribution due to seamen's fund under the provisions of

articles 456 and 457 of the Italian Maritime Code, and 1897*l.* 19*s.* 6*d.*, the amount due, with interest, under the bond, together with subsequent interest at 4 per cent. and costs.

Oct. 26. *Balloch*, for the plaintiffs in the bondholders' action (and also supporting the motion on behalf of the cargo owners), applied for payment out of the sum of 576*l.* 16*s.* 10*d.* in court, with liberty to reimburse themselves for payments made, and apply the balance, 359*l.* 6*s.* 6*d.*, in part satisfaction of the amount due under the judgment on the bond.

Butler Aspinall, for the plaintiffs in the necessaries action, intervening in the bondholders' action. (1) If the proceeds of ship and freight are paid out to the bondholders, the effect will be to exhaust the fund to which the necessaries men must look for satisfaction of their claim. It is submitted that the Court will, therefore, apply the equitable rule as to marshalling assets, and direct that the claim for necessaries be paid in priority out of the proceeds in court of ship and freight, leaving the bondholders to fall back upon the cargo for the balance of their claim; and in this way all the claimants will be satisfied. In *The Edward Oliver* (2), cited with approval in *The Daring* (3), and followed in *The Eugènie* (4), a master having given bonds on ship, freight, and cargo, binding himself, was allowed to have priority, in respect of his wages and disbursements, over the bondholders, as, otherwise, his claim would have been defeated by the bonds exhausting ship and freight.

Balloch, in reply. The case of *The Edward Oliver* (2) is not in point. The only decision there was that the rule laid down in *The Jonathan Goodhue* (5)—that the holders of a bottomry bond, upon which the master has made himself personally liable, are entitled to be paid out of the proceeds of ship and

(1) *Butler Aspinall* also applied for judgment in the necessaries action against the owners of the *Chioggia* and her freight. The trial of this action being by default, and no objection being raised by the bondholders intervening in the action, the learned judge pronounced judgment subject to the question of priorities.

(2) L. R. 1 A. & E. 379.

(3) (1868) L. R. 2 A. & E. 260.

(4) (1873) L. R. 4 A. & E. 123.

(5) (1859) Swa. 524.

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freight in priority to the master—is not absolute. If, therefore, there is sufficient to satisfy the bondholders out of ship, freight, and cargo, then the bondholders having no interest in opposing the claim of the master (who has a lien on ship and freight for his wages and disbursements), the Court will direct that the master be paid in priority, for the cargo owners have no equity entitling them to step in between the bondholders and the master, and, relying upon a rule made, not in their favour but, for the protection of the bondholder, deprive the master of the only source to which he could look for payment. In the present case, as it is not disputed that there will be sufficient out of ship, freight, and cargo to pay the bond, the master will be entitled to priority of payment out of ship and freight, and the bondholders have accordingly arranged to pay him out of these proceeds; but this reasoning will not apply to the claimants in the necessaries action who have no lien on ship or freight: *The Heinrich Björn.* (1) It may be true that having only the ship and freight to look to, the necessaries men will be defeated by the bondholders first exhausting these two funds, but they have no ground upon which they can ask the Court to marshal, for that would in effect compel the cargo owners to pay a claim for necessaries with which they have no concern, and which was incurred by the owners of the ship long before the present cargo was loaded. Unless there is some special equity, the principle of marshalling will not be applied, except between creditors of the same debtor, having demands against funds the property of the same debtor: *Aldrich* v. *Cooper* (2); *Ex parte Kendall.* (3) Here the owners of the ship and freight are different persons from the owners of the cargo, and the latter, as third parties, would be prejudiced by a burden being thrown upon them in respect of a transaction to which they are strangers. Again, after the agreed prior claims have been discharged, the bondholders, as against the cargo owners, are bound to exhaust ship and freight before they call upon the cargo owners, under their undertaking, to pay the balance. This is so laid down in *The Priscilla* (4),

(1) (1886) 11 App. Cas. 270.
(2) (1803) 8 Ves. 382; 1 W. & T. L. C. (7th ed.) 36, at p. 46.
(3) (1811) 17 Ves. 514.
(4) (1859) Lush. 1.

upon the authority of *The Prince Regent* (1), following the reasoning of Lord Stowell in *The Gratitudine*. (2) See also *The La Constancia*. (3)

Cur. adv. vult.

Nov. 8. GORELL BARNES J. This is a motion by bottomry bondholders, for payment out of court to them of the net proceeds of the Italian ship *Chioggia* and her freight, and that they may be at liberty thereout to reimburse themselves certain sums paid by them to the crew, to the master, and to the Italian consul, and apply the residue in part satisfaction of the judgment recovered by them in respect of their bond.

The motion is supported by the owners of the cargo, but is opposed by those who have supplied necessaries to the vessel, and, in respect of their claim, obtained judgment against the ship and freight.

[The learned judge then dealt with the nature of the proceedings in the two actions as already set out, and continued :—]

The value of the ship, freight, and cargo appears to be enough to meet all the claims, including costs; and the suppliers of the necessaries, who have no lien upon the ship and freight, but have recovered judgment against these interests, contend that, as they have only the ship and freight to look to, whilst the bondholders have the security of ship, freight, and cargo, they have a right to have the assets marshalled in their favour. The cargo owners, in whose interests the case has been argued, contend, however, that the bondholders have a prior right to the proceeds of the ship and freight, as against the necessaries men, and must exhaust these proceeds before coming on the cargo, and that if the assets are marshalled, the effect will be to compel the cargo owners to pay the claim of the necessaries men with which they have no concern.

It is not disputed that the claim of the bondholders has priority over that of the necessaries men, nor that the cargo cannot be made subject to the payment of the bond until the

(1) (1822) Not reported; see *The Dowthorpe*, (1843) 2 N. of C. 264, at p. 273.

(2) (1801) 3 C. Rob. 240, at p. 264.

(3) (1845) 2 Wm. Rob. 404, at p. 406; (1846) ibid. 460, at p. 464.

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THE CHIOGGIA.

Gorell Barnes J.

proceeds of the ship and freight have been exhausted; but the contention of the necessaries men is put in this way, that the bondholders having two funds upon which they can claim, namely, the proceeds of the ship and freight on the one hand, and the cargo on the other, whilst the necessaries men can only claim against the proceeds of the ship and freight, the latter ought according to the doctrine of marshalling to be paid first out of the proceeds of ship and freight.

But marshalling cannot be permitted to the prejudice of third persons. According to equitable doctrines, in order to marshal, not only should there be two creditors of the same person, but one of them should have two funds belonging to the same person, to which he can resort: see *Aldrich* v. *Cooper* (1); *Douglas* v. *Cooksey*. (2)

In the present case the two funds belong to different persons, namely, the shipowners and cargo owners respectively, and, in my opinion, the necessaries men have no right of marshalling. They have no equity to have the claims adjusted so as to compel the cargo owners in effect to provide the means of discharging the claim for necessaries.

The case of *The Edward Oliver* (3), which was principally relied on by the counsel for the necessaries men, does not apply, although the effect of that decision was to compel the cargo owners to pay a balance which was greater by the exact sum paid to the master out of the proceeds of ship and freight. The master had a lien upon these proceeds for the amount of his claim, and it was merely decided that the rule—that a master who has bound himself, as well as ship, freight, and cargo, for the payment of a bottomry bond, is not entitled to payment of his own claim in priority to that of the bondholders—cannot be invoked by the cargo owners, and will not be acted upon where the bondholder will not be prejudiced by the master being paid before him.

The net proceeds in Court—576*l.* 16*s.* 10*d.*—must therefore be paid out to the bondholders, and thereout they must be directed to repay themselves the sum of 106*l.* 8*s.* 8*d.*, paid to

(1) 8 Ves. 382; 1 W. & T. L. C. (7th ed.) 36, at p. 46.

(2) (1868) Ir. Rep. 2 Eq. 311.

(3) L. R. 1 A. & E. 379.

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THE CHIOGGIA.

Gorell Barnes J.

the crew, and to pay to the master the sum of 101*l.*, and to the Italian consul the sum of 10*l.* 1*s.* 8*d.*, on proof to the registrar that these sums are due, and apply the balance in discharge, pro tanto, of the amount due under their judgment. The bondholders are also entitled to their costs as interveners in the necessaries action.

Solicitors for bondholders: *Waltons, Johnson, Bubb & Whatton.*

Solicitors for necessaries men and cargo owners: *Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*

T. L. M.

IN THE GOODS OF PIAZZI-SMYTH.

1897

Oct. 25.

Probate—Grant of Probate—Joint Will.

Where a husband and wife made a joint will, the Court, upon the death of the wife, granted probate of so much of the instrument as became operative upon her death.

MOTION for probate.

Professor and Mrs. Piazzi-Smyth made in Edinburgh in 1888 a will which was as follows:—

"We, Charles Piazzi-Smyth, and spouse Jessie Duncan, or Piazzi-Smyth, do declare this writing to be our last will and testament.

"That is to say, I the said Charles Piazzi-Smyth, do hereby leave and bequeath and assign convey give grant devise and dispone to and in favour of the said Jessie Duncan, or Piazzi-Smyth, in case she shall survive me, as her absolute property, the whole means estate and effects heritable and moveable real and personal of whatever kind and whether situated in Scotland England or elsewhere presently belonging or addebted or which shall belong and be addebted to me at the time of my death, with the whole writs titles securities vouchers and instructions thereof.

"And, in like manner, I the said Jessie Duncan, or Piazzi-Smyth, do hereby leave, &c., as above, to and in favour of the

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PIAZZI-SMYTH, IN THE GOODS OF.

said Charles Piazzi-Smyth, in case he shall survive me, as his absolute property, the whole means, &c., as above.

"And we do hereby nominate and appoint the survivor of us to be the sole executor and universal legatory of such one of us as shall predecease.

"But we hereby declare that, on the death of the survivor, the provisions of this will hereinafter contained shall then receive effect and be carried out, unless the same shall have been replaced or set aside by a new will executed by the survivor alone, and we also declare that, so long as we both survive, we shall have full power to make any alterations in this will which we may find expedient or to replace the same by another.

"And further we appoint to act as trustees and executors of the survivor" A. B. and C. D., "who, after paying all our just and lawful debts, death-bed and funeral expenses of the trust, will dispose of the residue as follows." Then followed numerous legacies.

By a codicil of 1889 and two codicils of 1892 these legacies were revoked, altered, or confirmed.

Mrs. Piazzi-Smyth died in 1896.

Priestley, for Professor Piazzi-Smyth, the executor and surviving testator. It is submitted that the applicant is entitled to probate of the part of the document which constitutes the will of the wife. It is divisible into three separate parts: the will of the husband, should the wife survive; the will of the wife, should the husband survive; and the joint will of them both, which is to come into operation after both their deaths. It is not like that which was before Sir Cresswell Cresswell in *In the Goods of Raine* (1), and which he held could only take effect when both parties were dead.

[SIR F. H. JEUNE, PRESIDENT. Nor does it resemble that in *Hobson* v. *Blackburn and Blackburn* (2), which Sir John Nicholl held to be a contract rather than a will.]

(1) (1858) 1 Sw. & Tr. 144. This decision is questioned in Williams on Executors, 9th ed. vol. i. p. 8, note (*a*), and (1862) *In re Miskelly*, Ir. Rep. 4 Eq. 62.

(2) (1822) 1 Add. 274.

If the whole document should be included in the probate, publicity would be given to legacies which might never become effectual.

SIR F. H. JEUNE, PRESIDENT. I think that the best course will be to grant probate of so much of the instrument as becomes operative upon the death of the wife.

Solicitors: *Palmer, Eland & Nettleship.*

H. D. W.

IN THE GOODS OF SAMUEL BUTLER.

Probate—Administration—Limited Administration—Necessity for Annexation of Will.

In granting, for the purpose of a conveyance, administration limited to certain leasehold property of a testator, the Court held that the will should be annexed to the grant.

APPLICATION for limited administration.

Samuel Butler, formerly a lace manufacturer at Nottingham, died in 1896, having made a will by which he appointed his wife and Messrs. Ford and Mosley his executors and residuary legatees in trust.

The testator had in 1871 executed a deed of assignment in favour of his creditors, for whom the applicant Mr. Thomas Leman was thereby appointed trustee. By its terms the whole of the debtor's property real and personal, excepting certain leaseholds, was assigned to the trustee, and as to these the debtor covenanted "to stand possessed thereof in trust for the trustee, and to deal with and dispose of the same and of the income thereof as the trustee should direct." At the time of the assignment the title-deeds of the factory were deposited with the Nottingham and Nottinghamshire Banking Company, Limited, as security for a loan. The business was then sold to a company of which the debtor became managing director, the purchase-money being advanced by the bank in return for debentures sufficient to cover the amount of the mortgage and

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fresh advance. The company was not successful, and the testator resigned his position as managing director some time before his death. The estate was insolvent. The bank now required a conveyance of the leasehold property, for which purpose it was necessary that there should be a legal personal representative of the testator appointed.

Messrs. Ford and Mosley had renounced, and the widow, who was residuary legatee for life, and the children, who were substituted residuary legatees, had been cited to take general administration with the will annexed, but had not appeared.

The applicant had nominated Mr. Youngman, of Nottingham, as the representative of the bank, to take a limited grant and give security.

Hextall, for the applicant. The applicant is clearly entitled to a grant limited to the leasehold property, of which the testator was trustee for him. The only question is whether or not the will should be annexed to such grant. In Tristram and Coote's Probate Practice, 12th ed. p. 160, under the head of "Limited Administrations," it is stated that "Whether the deceased has died testate or intestate, administration is granted without the will being annexed, as the object of the representation in no way interferes with the administration of the deceased's own estate."

SIR F. H. JEUNE, PRESIDENT. I think that the will had better be annexed to the grant. There will be a grant of administration with the will annexed, limited to the particular leaseholds, to the applicant or his nominee.

Solicitor: *Kinch, for Eking & Wyles, Nottingham.*

H. D. W.

In the Goods of BARTON.

1897
Nov. 15.

Probate—Administration—Administration de bonis non—Grant to Attorney Necessity for Notice.

Where administration had been granted to the attorney of one of two next of kin, both of whom resided out of the jurisdiction, and the administrator died leaving the estate partly unadministered, the Court, upon proof of notice to the next of kin for whose benefit the administration had been granted, granted administration de bonis non to the attorney of the other next of kin.

Application for a grant of administration de bonis non.

In 1890 administration of the personal estate of Albert Tinley Barton, late of Sydney, New South Wales, whose death had been allowed to be presumed, was granted to Randolph Charles Want, solicitor, as attorney for Reginald Albert Barton, one of the two children and next of kin of the presumed deceased, both of whom resided in New South Wales. Randolph Charles Want died in 1895, leaving unadministered certain property to which the estate had become entitled, consisting of a share in the residuary estate of Captain Henry Barton, the father of the presumed deceased.

It appeared that Reginald Albert Barton had assigned all his interest in his father's estate, and that the assignees had been communicated with and furnished with a power of attorney for execution by him, but that he had taken no action.

The application was by Eveline May Lambert, wife of Richard Thomas Lambert, of Sydney, the daughter and the other next of kin of Albert Tinley Barton, for a grant de bonis non to George Miller Light, Mr. Want's successor in business, as his attorney. Mrs. Lambert desired to sell her interest under the will of her grandfather.

Barnard, in support of the application. The learned registrar seems to have felt some difficulty as to this matter; but it is submitted that the right of the applicant is absolute. It is stated in Williams on Executors, 9th ed. vol. i. p. 412, that no distinction exists between an original and a de bonis non

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administration. If so, the son and the daughter have equal rights. Notice to the other next of kin was not, therefore, requisite; but, if requisite, it has practically been given.

SIR F. H. JEUNE, PRESIDENT. I must not be supposed to say that such a grant as this could be made without notice to the person whose attorney has died. As such notice has in effect been given, a grant de bonis non may be made to the attorney of the applicant, till she comes to this country and applies for a grant.

Solicitors: *Light & Galbraith.*

H. D. W.

1897

Nov. 22.

IN THE GOODS OF STILES.

Probate—Executor—Renunciation—Retractation of Renunciation—Court of Probate Act, 1857 (20 & 21 *Vict. c.* 77), *s.* 79.

The old practice which, in a proper case, allowed a co-executor who had renounced probate to retract his renunciation, is not abrogated by s. 79 of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77).

Where one of two executors absconded after taking probate, the Court allowed his co-executor, who had renounced, to retract his renunciation and take probate.

APPLICATION by Henry Tournay Stiles for leave to retract his renunciation as executor of the will with a codicil of Maria Stiles, and that probate might be granted to him.

Maria Stiles was married to Thomas Stiles in 1834. By her will dated in 1877, in the exercise of a power of appointment contained in her marriage settlement, she appointed that, subject to the life interest of her husband, the trustees should stand possessed of 1000*l.*, in trust to pay Henry Tournay Stiles 250*l.*, and 750*l.* to Henry Tournay Stiles and Edmund Cammack upon the trusts therein declared, and appointed them executors. The codicil did not affect the appointment.

Maria Stiles died in 1880, Thomas Stiles in 1894. The will and codicil were proved by Edmund Cammack, who was a solicitor, the applicant, his co-executor, renouncing probate.

In 1895 Edmund Cammack absconded, and his address could not be ascertained.

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STILES, IN THE GOODS OF.

The fund had been invested on a mortgage of lands in Lincolnshire, which had been paid off. The trustees of the settlement, who were Edmund Cammack and William Armstrong, had paid the applicant 150*l.* on account of his legacy of 250*l.*; the executors of the will had applied 50*l.* in payment of duties and testamentary expenses; and William Armstrong had deposited 800*l.* with the Spalding branch of the National Provincial Banking Company, and refused to pay it over until he could obtain a proper discharge from the trustees and executors of the will.

Barnard, in support of the application. According to the practice of the Ecclesiastical Court a co-executor who had renounced could retract his renunciation at any time before a grant of administration: Williams on Executors, 9th ed. vol. i., p. 233.

The words of s. 79 of the Court of Probate Act, 1857 (1), do not expressly abrogate this practice. From a dictum of Lord Penzance in *In the Goods of Badenach* (2) it would seem that he did not think that the section affected it, though his judgment in *In the Goods of Whitham* (3) is perhaps ambiguous; and Lord Hannen seems to have taken the same view: *In the Goods of Gill* (4); *In the Goods of Morant.* (5)

In the alternative, the applicant is entitled under 38 Geo. 3, c. 87, s. 1.

SIR F. H. JEUNE, PRESIDENT. I think that I ought to decide this point, which appears up to the present time to have been left open, in favour of the applicant. I see no reason, in the nature of things, why, in a proper case, where

(1) By the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 79, "Where any person, after the commencement of this Act, renounces probate of the will of which he is appointed executor or one of the executors, the rights of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor."

(2) (1864) 3 Sw. & Tr. 465.

(3) (1866) 1 P. & M. 303.

(4) (1873) 3 P. & M. 113.

(5) (1874) 3 P. & M. 151.

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The President.

circumstances have altered, one of several executors should not be allowed to retract his renunciation and carry on the executorship.

Under the old law, where all the executors of a will renounced, and administration had been granted, the renunciation could not be retracted, for the obvious reason that the representation had been suffered to go into another channel, and the executors could not be allowed to come in and alter the state of things to which their conduct had given rise. But where some executors proved and others renounced, those who had renounced were allowed to retract, as they could then be let in, without altering the devolution of the representation, seeing that they would only occupy the position which they might have originally assumed.

Now, the 79th section of the Act of 1857 says: "Where any person, after the commencement of this Act, renounces probate of the will of which he is appointed executor, ... the rights of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor." I think that the words "the rights of such person shall wholly cease" are to be read in connection with those which follow, and that the effect is merely that, when an executor has renounced, it shall not afterwards be necessary to cite him.

This seems to me to have been the view of Lord Penzance. In *In the Goods of Badenach* (1) he said to the learned counsel who argued that the section prevented retractation: "I do not think that is the object of the clause. There is nothing in the clause to prevent the Courts from allowing a retractation according to the old practice in a case fit for it." It is true that this was said obiter, but it was said by Lord Penzance and in 1864. *In the Goods of Whitham* (2) was decided by him in 1866. It was a peculiar case, in which an executor who had renounced before the passing of the Act retracted that renunciation for the purpose of renouncing again after the

(1) 3 Sw. & Tr. 465.

(2) 1 P. & D. 303.

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The President.

passing of the Act, and so bringing himself under it. Lord Penzance said: "It is true that the Ecclesiastical Courts did permit a man who had renounced to retract his renunciation, but it was for the purpose of taking a grant, and was in fact a part of the application for a grant. Except for that purpose, I think that it is not possible for an executor to retract his renunciation." I think that this passage shews that Lord Penzance adhered to this former view, and did not consider that the section had in any way changed the former practice in respect of renunciation. Lord Hannen in the cases which have been cited can hardly be said to have expressed any definite view.

I think, therefore, that, in a proper case, one of several executors may be allowed to retract his renunciation. Here the executor who took probate has absconded, and I think that the executor who renounced should be allowed to retract his renunciation and take probate.

Solicitors: *Robbins, Billing & Co., for W. J. Stiles, Spalding.*

H. D. W.

IN THE GOODS OF WYATT.

1897
Nov. 8.

Probate—Practice—Conduct Money—Court of Probate Act, 1857 (20 & 21 *Vict. c.* 77), *s.* 26.

Semble, that conduct money cannot be claimed in the first instance by a person who is directed to attend for the purpose of being examined pursuant to s. 26 of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77).

EXAMINATION of Thomas Hill, of the College Farm, Purton, Wiltshire, pursuant to an order that he "do attend for the purpose of being examined as to his possession or knowledge of the original will of Margaret Wyatt."

An affidavit of the applicant Fanny Bryant, niece of the alleged testatrix, stated that Thomas Hill was a nephew and one of the executors of her aunt, and that after her aunt's death

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WYATT, IN THE GOODS OF.

in 1873 he had read over the will to the family. A copy of the will was annexed to the affidavit. The document contained a provision for the payment of five shillings a week to the applicant for life.

Woodfin, who appeared for Thomas Hill, complained that the witness, who had come from a distance, had not received conduct money. He cited Order XXXVII., r. 9, "Any person required to attend for the purpose of being examined or of producing any document, shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in court," and referred to the judgment of Sir J. Romilly M.R. in *Brocas* v. *Lloyd*. (1)

R. H. Pritchard, for the applicant, referred to Order XXXVIII., r. 28: "The party producing such deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production."

SIR F. H. JEUNE, PRESIDENT. This person attends pursuant to an order made under s. 26 of the Court of Probate Act, 1857. (2) I do not think that a person so attending can claim

(1) (1856) 23 Beav. 129.

(2) By s. 26 of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), "The Court of Probate may, on motion or petition, or otherwise, in a summary way, whether any suit or other proceeding shall or shall not be pending in the court with respect to any probate or administration, order any person to produce and bring into the principal or any district registry, or otherwise as the Court may direct, any paper or writing being or purporting to be testamentary, which may be shewn to be in the possession or under the control of such person; and, if it be not shewn that any such paper or writing is in the possession or under the control of such person, but it shall appear that there are reasonable grounds for believing that he has the knowledge of any such paper or writing, the Court may direct such person to attend for the purpose of being examined in open court, or upon interrogatories respecting the same, and such person shall be bound to answer such questions, or interrogatories, and, if so ordered, to produce and bring in such paper or writing, and shall be subject to the like process of contempt in case of default in not attending or in not answering such questions or interrogatories, or not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit in the court and had made such default; and the costs of any such motion, petition or other proceeding shall be in the discretion of the Court."

conduct money in the first instance. His expenses can be dealt with under the power to award costs. 1897

WYATT, IN THE GOODS OF

The examination proceeded, and the question of costs was reserved.

Solicitors: *F. Ridley; Wood, Bowie & Co.*

H. D. W.

IN THE GOODS OF MATTHEWS.

1897 *Nov.* 22.

Probate—Presumption of Death—Time of Application.

The Court, on proof of sufficient inquiries, allowed the death of a testator to be sworn three years after his disappearance.

APPLICATION for leave to depose that the death of the testator had occurred on or since November 24, 1894.

James Matthews, aged seventy-three, disappeared from his home in Chatham Road, Wandsworth, on November 24, 1894, and was not afterwards heard of.

He had retired from business, and, at the time of his disappearance, was living with his wife's sister and her husband, Mr. and Mrs. Deller, on the income arising from the rents of some houses in Wandsworth and Shadwell.

By his will and a codicil, dated in 1872 and 1873 respectively, he made his wife sole executrix and residuary legatee, and left her all his real and personal property for life, and, after her death, devised the houses specifically, some to Mrs. Deller, some to Mrs. Minton, Mrs. Deller's daughter, and some to his niece Mrs. Fenton.

His wife was dead, and Mrs. Fenton, besides being a specific devisee under the will, was one of the next of kin and probably the heiress-at-law of the testator.

It appeared from affidavits sworn by Mrs. Minton, the applicant, and her solicitor, that, since the disappearance of the testator, searches had been made by members of the family in the neighbourhood without result, advertisements had been published in five newspapers, the register of deaths searched,

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and the relieving officer and the local superintendent of police communicated with. None of the tenants had seen the testator, and the agent, who continued to collect the rents, refused to account for them to the legatees.

Priestley, in support of the application.

SIR F. H. JEUNE, PRESIDENT. The time since the disappearance is, no doubt, short, but the inquiries made seem to have been very ample. I think that leave may be granted.

Solicitors: *Barlow & Barlow, for R. T. Griffiths, Hay.*

H. D. W.

1897
Oct. 27.

WYNNE *v.* WYNNE.

Divorce—Desertion—Husband absconding under Criminal Charge.

Where it appeared that more than two years before a wife's petition for dissolution, her husband, who had formed an adulterous connection with another woman, had absconded in order to avoid criminal proceedings, falsely stating to her that he intended to be away only for a short time, and had since concealed his address from her, the Court, on the authority of *Drew* v. *Drew*, (1888) 13 P.D. 97, found him guilty of desertion.

UNDEFENDED divorce suit, in which Marianne Aubrey Wynne petitioned for a dissolution of her marriage with Llewellyn Malcolm Wynne on the ground of adultery and desertion.

The marriage took place in 1881. There were no children.

The respondent practised as a solicitor in Lincoln's Inn Fields with his brother Campbell Wynne under the style of Wynne & Son. In March, 1895, the firm became bankrupt, their liabilities being estimated at more than 300,000*l.* It appeared in the proceedings that the respondent had in February, 1895, been co-respondent in a case of *Hawtin* v. *Hawtin and Wynne*, in which the jury had disagreed, and that during the previous eight years he had lost 60,000*l.* on the Stock Exchange, and had been spending 30,000*l.* a year. It having

been stated that he had gone abroad, and could not be traced, the official receiver procured a warrant for his arrest.

The petitioner deposed that she last saw her husband on March 2, 1895, in the presence of his brother, Campbell Wynne, at the Charing Cross Hotel. She said: "He told me that he was ruined; that he could not face the scandal, and was going away for a few months. I thought he only meant the divorce case. He went in spite of my asking him to stop. He has never been near me since. I did not know of his financial difficulties, until I saw the account in the newspapers."

An actress deposed to adultery committed by the respondent with her in 1893 and 1894. She said: "I do not know where he is now."

Two letters of the respondent posted in England in July, 1896, one to the brother of the petitioner, the other to herself, were produced. They were as follows:—

"I am in England. I have written to Cam (i.e. Campbell Wynne) to say what my plans are";

and,

"Can you help me? I have nothing, and have sold all I had in the way of jewellery, clothes, &c. I have only two alternatives, either to shoot myself, or give myself up. If I had a little capital, I could make a living. Cam has very kindly offered me a small allowance, but I cannot live on it. It was supposed that I had a large sum of money with me. After deducting the £800 I sent back, I had very little left. If you answer this, write to Cam."

The petition was dated July 2, 1897.

Bargrave Deane, Q.C. (*Priestley*, with him), for the petitioner, in submitting that the matrimonial offence of desertion without cause for two years had been proved, referred to *Drew* v. *Drew*. (1)

SIR F. H. JEUNE, PRESIDENT. I think that the evidence is sufficient.

No doubt there is at first sight a difficulty. The respondent absconded owing to financial embarrassment. But this does not dispose of the charge of desertion. In *Drew* v. *Drew* (1)

(1) 13 P. D. 97.

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The President.

Sir James Hannen pointed out that the question is as to the intention of the person charged at the time of the commencement of the alleged desertion; and, speaking of the conduct of the respondent in that case, he said: "Though he was obliged to fly from his creditors, that does not exclude the idea that he also intended to desert his wife," and, in the last words of his judgment, "The evidence leads to this conclusion, that at the time he endeavoured to avoid being arrested, he also availed himself of that opportunity to desert his wife."

In this case I have to look at the facts to see whether over and above the main object of the respondent, which was to hide, there was this other object; and I think that the evidence points to this conclusion. Before he absconded he had formed an adulterous connection with another woman. It is true that he did not, like the respondent in *Drew* v. *Drew* (1), contemplate taking this woman away with him; but his conduct shews that he had lost his affection for his wife. A more important matter is that at their last interview he told her that he should only be away for a few months, which was a falsehood. He also concealed his address from her, though he appears to have given it to his brother. I think that under the circumstances desertion has been proved, and I grant a decree nisi.

Solicitors: *Arthur Newton & Co.*

(1) 13 P. D. 97.

H. D. W.

CADELL AND ANOTHER *v.* WILCOCKS AND OTHERS.

1897
Dec. 1, 2, 7.

Probate—Will—Several Testamentary Papers—Revocation—Will made in execution of Limited Power of Appointment.

The father of the testatrix left her the sum of 4000*l.* for life with power of appointment by will among her children. The testatrix made three wills, one in 1890, by which she left one of her daughters "the sum of 4000*l.*, being the sum left to me by the will of my father"; a second in 1894, by which she left the same daughter 4000*l.* and the residue of her property to the same daughter and one of her sons; and a third in 1895, by which she left all her property to the same daughter:—

Held, that, as the second and third wills both professed to deal with all the property of the testatrix, the second will was revoked by the third, that the general words of bequest in the third will did not revoke the execution of the limited power of appointment by the first will, and that probate should, therefore, be granted of the first and third wills.

In the Goods of Merritt, (1858) 1 Sw. & Tr. 112, and *In the Goods of Joys*, (1860) 4 Sw. & Tr. 214, disapproved.

ACTION for probate.

The testatrix, Mrs. Lucy Biddulph, made three wills. The first, dated April 26, 1890, was as follows: "I Lucy Biddulph of Rathrobin, Tullamore, in the King's County, widow, being of sound mind memory and understanding, do hereby make this as and for my last will and testament, hereby revoking all wills or will heretofore made by me. I hereby give and bequeath unto my dear daughter Gertrude Louisa Anderson the sum of 4000*l.* absolutely for her sole use and benefit, being the sum left me by the will of my father the late Robert Bickerstaffe. I bequeath to my faithful steward Finton Macdonald the sum of 50*l.* free from legacy duty, and, as to the rest and residue of my property wheresoever situate, I will devise and bequeath the same unto my dear children Anne Adela Wallis Wilcocks, Middleton Biddulph, Assheton Biddulph, Franc Digby Biddulph Colclough, and Gertrude Louisa Anderson, share and share alike as tenants in common. I appoint my two sons Middleton Biddulph and Assheton Biddulph to be executors of this my will and testament."

Robert Bickerstaffe, who died in 1841, by his will left 16,000*l.*

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CADELL v. WILCOCKS.

among his four daughters, of whom the testatrix was one, in equal shares for life, with power of appointment by will among their children, and, in default of appointment, to the children of each in equal shares.

The second will dated July 5, 1894, was as follows: "This is the last will and testament of me Lucy Biddulph, at present residing at Flintern Abbey in the county of Wexford, widow. I give and bequeath to my dear daughter Gertrude Louisa now the wife of Nevil Pottow Cadell the sum of 4000*l.* for her own absolute use and benefit and to dispose of as she may think fit. I bequeath to my faithful steward Finton Macdonald the sum of 50*l.* free from legacy duty. I give devise and bequeath all the remainder of my property real or personal wheresoever situate to my dear children Franc Digby Biddulph Colclough and the said Gertrude Louisa Cadell share and share alike as tenants in common and I appoint the said Franc Digby Biddulph Colclough Gertrude Louisa Cadell and Nevil Pottow Cadell executors of this my will."

The third will, dated September 5, 1895, was as follows: "This is the last will and testament of me Lucy Biddulph, at present residing at Clare House Tiverton in North Devon, widow. I give devise and bequeath to my dear daughter Gertrude Louisa now the wife of Nevil Pottow Cadell all the property real freehold or personal wheresoever situate of which I may die seised or possessed for her own absolute use and benefit and to dispose of as she may think fit. But, in case my said daughter shall predecease me, I give devise and bequeath all my said property real freehold or personal to the said Nevil Pottow Cadell for his own absolute use and benefit. And I appoint my said daughter Gertrude Louisa Cadell and the said Nevil Pottow Cadell executrix and executor of this my will."

The circumstances under which the wills were made are stated in the judgment.

The plaintiffs Nevil Pottow and Gertrude Louisa Cadell, as executors of the third will, propounded the three wills.

The defendants, Anne Adela Wallis Wilcocks, Middleton Biddulph, Assheton Biddulph, and Lucy Biddulph Colclough,

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an infant by her guardian ad litem, claimed that the third will only should be admitted to probate.

Bargrave Deane, Q.C. (*Barnard* with him), for the plaintiffs. The three wills should be admitted to probate.

Questions of revocation are questions of intention: see per Sir John Nicholl in *Methuen* v. *Methuen*. (1) The testatrix made her first will in the exercise of her limited power of appointment under her father's will. Her second and third wills are really repetitions of her first will, with alterations consequent upon altered circumstances. Neither of these wills contains a revoking clause, or anything to shew a departure from the original intention to benefit her daughter Gertrude. The three wills ought therefore to stand, as together forming "the aggregate of the testamentary intentions" of the testatrix: see per Lord Penzance in *Lemage* v. *Goodban*. (2)

The question under what circumstances a will executing a power is revoked by a subsequent will is discussed in Williams on Executors, 9th ed. pp. 150–152, where it is stated that in *In the Goods of Merritt* (3) Sir Cresswell Cresswell laid down a rule, founded on ecclesiastical decisions, that "a general clause revoking all former wills is not sufficient to manifest an intention to revoke a will made in execution of a power." In other words, there must be a definite revocation of a definite appointment.

Inderwick, Q.C. (*Priestley* with him), for the infant defendant. Only the third will should be admitted to probate. The third will revokes the second will, and the second will revokes the first will. The second and third wills do not refer to the power or to the subject over which it is to be exercised, and are, therefore, not executions of it. The sum left to her under her father's will may have in fact been all that the testatrix had to leave; but evidence of this state of things has been held to be inadmissible where the question is whether a bequest not so expressed is or is not made in execution of a power: see the judgment of Sir W. Grant in *Jones* v. *Tucker* (4), where he

(1) (1817) 2 Phill. 416, at p. 426.
(2) (1865) 1 P. & D. 57.
(3) 1 Sw. & Tr. 112.
(4) (1817) 2 Mer. 533.

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cites the decisions of Lord Thurlow in *Andrews* v. *Emmot* (1) and of Lord Eldon in *Nannock* v. *Horton*. (2)

The rule laid down in *In the Goods of Merritt* (3) is no longer of authority. It has been disapproved by Jessel M.R. and by the Court of Appeal, after arguments by distinguished counsel, in *Sotheran* v. *Dening* (4), and by Kay J., who acted on that decision, in *In re Kingdon, Wilkins* v. *Pryer* (5); and it is negatived in note (*p*) to p. 152 of Williams on Executors, 9th ed.

The general bequest in the third will cannot operate as an execution of the special power: *In re Esther Williams, Foulkes* v. *Williams*. (6)

Lambert Bond, for the other defendants.

Bargrave Deane, Q.C., in reply. The Chancery cases cited deal with wills of lands. The rule is similarly stated by Sir E. Sugden in his argument in the Court of Delegates in *Hughes* v. *Turner*. (7)

Cur. adv. vult.

Dec. 7. SIR F. H. JEUNE, PRESIDENT. The question in this case is, which of three wills made respectively on April 26, 1890, July 5, 1894, and September 5, 1895, by the testatrix, Mrs. Lucy Biddulph, should be admitted to probate.

The father of the testatrix, Robert Bickerstaffe, left 16,000*l.* among his four daughters in equal shares for life, with power of appointment to each of them by will amongst her children, and, in default of appointment, to her children equally.

At the time of the will of 1890, the testatrix had two daughters, Anne, then married, and Gertrude, then a widow, and three sons, Middleton, Assheton, and Franc. By the will of 1890 the testatrix, after revoking all previous wills, gave her daughter Gertrude "the sum of 4000*l.* absolutely for her sole use and benefit," describing it as "being the sum left to me by the will of my father the late Robert Bickerstaffe." She then bequeathed 50*l.* to her steward, Finton McDonald, and the residue of her

(1) (1788) 2 Bro. 297.
(2) (1802) 7 Ves. 390.
(3) 1 Sw. & Tr. 112.
(4) (1881) 20 Ch. D. 99.
(5) (1886) 32 Ch. D. 604.
(6) (1889) 42 Ch. D. 93.
(7) (1831) 4 Hagg. Ecc. 30, at p. 71.

property to her five children equally, and appointed her sons, Middleton and Assheton, executors. It was not denied before me that this was a good execution by the testatrix of the limited power of appointment vested in her by the will of her father.

Between the wills of 1890 and 1894 the daughter Gertrude married Dr. Nevil Cadell, and I understand that the sons Middleton and Assheton received a benefit under the will of an uncle, the testatrix's brother. By her will of 1894 the testatrix bequeathed to her daughter Gertrude "the sum of 4000*l.* for her own absolute use and benefit, and to dispose of as she may think fit." She then gave 50*l.* to her steward, Finton McDonald, and the residue of her property to her children Franc and Gertrude equally, and appointed Franc Gertrude and Dr. Nevil Cadell executors.

Between the wills of 1894 and 1895, Franc, the son of the testatrix, and also the steward died. A letter of the testatrix containing her instructions for the will of 1895 was produced to me, but I do not think it material. By the will of 1895 the testatrix made a bequest to her daughter Gertrude in these terms: "All the property real freehold or personal wheresoever situate of which I may die seised or possessed for her own absolute use and benefit and to dispose of as she may think fit," and gave the same, in case of her daughter predeceasing her, to her daughter's husband, Dr. Nevil Cadell, and appointed her daughter and Dr. Cadell executrix and executor.

Neither the will of 1894, nor the will of 1895, contained any words of revocation; and it was not disputed before me, that neither the terms of the will of 1894, nor those of the will of 1895, were sufficient to effect a valid execution of the limited power of appointment vested in the testatrix.

I think that this case is governed by the familiar principle of law stated in Williams on Executors, 9th ed. p. 138, and approved by Lord Penzance in *Lemage* v. *Goodban* (1), that the mere fact of making a subsequent testamentary paper does not work a total revocation of the prior one, unless the latter expressly or in effect revoke the former, or the two be incapable

(1) 1 P. & D. 57.

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of standing together, and if a subsequent testamentary paper, whether will or codicil, be partially inconsistent with one of earlier date, then such latter instrument will revoke the former as to those parts only where they are inconsistent.

In this case there was clearly no express revocation, in whole or in part, of the will of 1890 by either the will of 1894 or the will of 1895. I assent to Mr. Inderwick's contention that, had there been a general clause of revocation in either the will of 1894 or that of 1895, it would have revoked the whole will of 1890, including the execution of the power contained in it. The opinion indeed of the Delegates in the case of *Hughes* v. *Turner* (1), if correctly reported, would appear to be to the effect that a clause of revocation per se does not revoke the portion of an earlier will which has executed a power; and in *In the Goods of Merritt* (2) and in *In the Goods of Joys* (3) Sir Cresswell Cresswell expressed a similar opinion. It might be considered doubtful whether the case of *Sotheran* v. *Dening* (4) in the Court of Appeal overruled those authorities, because weight was given to the consideration, which arose in that case, that by virtue of the 27th section of the Wills Act a general bequest operated on the subject-matter of the power of appointment, and so strengthened the evidence in favour of an intention to revoke its previous execution. But in *In re Kingdon* (5) the question of revocation by a general revocatory clause arose simpliciter, there being no subsequent provision relating to the subject-matter of the power in question, and Kay J. clearly considered that he was justified by the authority of *Sotheran* v. *Dening* (4) in holding that a will executing a power was revoked in toto by general words of revocation in a subsequent will. The effect of his decision is, I venture to think, that on this point of law common sense at last prevailed. I cannot understand why express words, revoking all previous wills, should be supposed to spare an execution of a power contained in one or more of them from the fate inflicted on all the rest of their contents. But, in the present instance, there are no express words to revoke the will of 1890.

(1) 4 Hagg. Ecc. 30, at p. 71.
(2) 1 Sw. & Tr. 112.
(3) 4 Sw. & Tr. 214.
(4) 20 Ch. D. 99.
(5) 32 Ch. D. 604.

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Next, is there anything in the wills of 1894 or 1895 inconsistent with the execution of the power in the will of 1890, or, in other words, is there anything that by implication effects a revocation of that execution? It is not necessary to consider whether, if the power of appointment in this case had been general and not, as it was, limited, the general bequests in the wills of 1894 and 1895 would have been not only, by virtue of the 27th section of the Wills Act, effectual to execute the power, but also sufficient to revoke a previous execution of it. It is, I think, clear that these general words of bequest, which do not execute the limited power, as the 27th section of the Wills Act has no application, cannot revoke or affect its previous execution. The wills of 1890 and 1895 can, therefore, stand together; and, subject to proof in common form, there should be probate of both of them. The will of 1894 I regard as revoked by that of 1895, as both wills profess to deal with the whole of the testatrix's own property.

Solicitors: *Clarke & Blundell; Boxall & Boxall; E. R. Crump.*

H. D. W.

IN THE GOODS OF HURLSTON.

1898

Jan. 17.

Probate—Presumption of Death—Practice—Affidavit of Applicant.

On an application for leave to presume the death of a person who has disappeared, the affidavit of the applicant should contain a statement of belief that the death occurred at the alleged date.

APPLICATION for leave to presume the death of Edmund Hurlston.

The alleged deceased had been fourth lieutenant of the *Aden*, one of the steamers of the Peninsular and Oriental Steam Navigation Company. He sailed on board the *Aden* from Colombo for London on June 2, 1897. The steamer encountered heavy weather in the Indian Ocean, and on June 9 struck on the island of Socotra off Ras R'dresser, when all the boats but one were swept away. The remaining boat was launched and was manned, among others, by Mr. Hurlston. She failed

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to make the land and disappeared. The company had caused a careful search to be made by the *Rohilla* and other steamers about Socotra, the Arabian mainland, and the Laccadive Archipelago, but had found no traces of the missing lifeboat, and on July 21, 1897, they published a notice in newspapers stating that all hope had been abandoned that any of those on board survived.

These facts were deposed to by a survivor who had been picked up by a passing ship, and by the secretary to the company.

The company had paid Mr. Hurlston's wages to the Board of Trade, and the insurance company with which he had insured his life were satisfied of his death.

The applicant, Mr. Hurlston's mother and the sole executrix of his will, and her daughter deposed that they had received no communication from him since the wreck, but did not specifically state in their affidavits their belief that he had died on or after the date of it.

Willock, in support of the application.

GORELL BARNES J. It is essential in these cases that the applicant should state a belief that the death occurred on or after the alleged date. The applicant must make a supplementary affidavit containing a statement to this effect. When this supplementary affidavit has been filed at the registry, the order may be made as prayed.

Solicitors: *Hunters & Haynes.*

H. D. W.

SMITH *v.* SMITH.

1897
Dec. 20.

Divorce—Permanent Maintenance—Clause "dum sola" without "et casta."

An order for permanent maintenance may be made containing a clause "dum sola vixerit" without the addition of "et casta."

MOTION to confirm the report of the registrar as to permanent maintenance.

The marriage of the petitioner Florence Smith with the respondent William Smith had been dissolved on the ground of his adultery and cruelty.

It appeared that there was one child of the marriage, a daughter aged seven, and that alimony pendente lite had been allowed at the rate of 220*l.* a year. The respondent possessed an income of 972*l.* a year, and a reversionary interest in a sum of about 8000*l.* expectant on the death of his mother, the present value of which was estimated at about 5400*l.* The petitioner had no private income. It was alleged by the respondent, but was not admitted by her, that she was engaged to be married to a man who had 200*l.* or 300*l.* a year.

The registrar recommended that the respondent should secure to the petitioner a sum of 400*l.* a year for life, and a further sum of 100*l.* a year for the maintenance of her daughter till she should attain the age of twenty-one, and submitted whether the case was one in which the deed should contain a clause "dum sola et casta."

Inderwick, Q.C., and *Priestley*, for the petitioner.
Bargrave Deane, Q.C., and *R. W. Turner*, for the respondent.

SIR F. H. JEUNE, PRESIDENT. As the conduct of the petitioner has been irreproachable during the marriage, I think that the words "et casta" may properly be omitted in the clause. It has no doubt, going back for a long time, been usual to add "et casta" to "sola." I believe that in former days it was not thought that any imputation was implied. But

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now such an imputation is supposed, however faintly, to be conveyed; and, therefore, I think "dum sola" may be inserted without adding "et casta," as it appears to me unreasonable that the condition, often very proper to impose, of widowhood, should be restricted to the cases where unchastity is not altogether improbable. The order will be that the petitioner do receive 350*l.* a year for life, with an additional 50*l.* a year if and when the reversionary interest of the respondent shall fall into possession, such additional 50*l.* a year to be payable "dum sola vixerit," and 100*l.* a year for the maintenance of the daughter of the marriage during her minority.

Solicitors: *Vincent & Vincent, for North & Sons, Leeds; Hamlin, Grammer & Hamlin, for Cousins & Cousins, Leeds.*

H. D. W.

1897
Dec. 15, 16.
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Jan. 24.

THE KNIGHT OF ST. MICHAEL.

Admiralty—Insurance (Marine)—Policy—Construction—Coal Cargo—Heating—Discharge and Sale—Loss of Freight—Peril of "Fire . . . . . and all other Losses and Misfortunes."

The plaintiffs chartered their vessel to carry a cargo of coals from Newcastle, New South Wales, to Valparaiso at 15*s.* per ton payable on delivery, and they effected insurances with the defendant underwriters on the freight upon the ship by policies which insured against fire and "all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the subject-matter of the insurance or any part thereof."

The vessel only delivered a portion of the cargo at her port of discharge as, a few days after starting on the voyage, she was compelled to put into Sydney owing to the heating of the coals, and, on the recommendation of surveyors, the larger portion of the cargo was discharged and sold, entailing a consequent loss of freight:—

Held, by Gorell Barnes J., that the defendants were liable to make good to the plaintiffs the loss of freight as a partial loss under the policies, for, though no part of the coal was ever actually on fire, it was reasonably certain that, if the vessel had continued on her direct voyage, the temperature of the coal would have risen until spontaneous combustion ensued, involving, in all probability, the destruction of ship and cargo by

fire, so that there was an existing condition of things producing imminent danger of fire, not merely a fear of fire, or, if it was not a loss by fire, it was a loss ejusdem generis covered by the words "all other losses and misfortunes."

SPECIAL CASE, stated by agreement of the parties, without pleadings, in an action to recover 1338*l.* 2*s.* 4*d.* on three policies of insurance for 1000*l.*, 1000*l.*, and 500*l.* respectively, upon freight, in which Robert L. Greenshields, on behalf of himself and others, the owners of the *Knight of St. Michael*, was plaintiff, and the Sea Insurance Company, Limited, the London and Provincial Marine Insurance Company, Limited, and the Union Marine Insurance Company, Limited, were defendants.

The facts set out in the special case are stated in the judgment, as also the material parts of the policies which formed part of the case. Annexed to the case were copies of the ship's protest and of the reports of the surveyors and of the Government geologist on the cargo of coals. The Court was to be at liberty to draw inferences of fact.

The questions for the opinion of the Court were—

1. Whether the defendant companies, underwriters on freight, were liable directly to make good to the plaintiffs the loss of freight as a partial loss under the policies.

2. Whether the defendants were liable to make good or to contribute to the loss of freight as a general average loss.

It was agreed that the decision of the Court should be final.

1897. Dec. 15, 16. *Carver, Q.C.*, and *A. D. Bateson*, for the plaintiff.

Joseph Walton, Q.C., and *Scrutton*, for the defendants.

The arguments of counsel fully appear from the judgment. In addition to the cases there mentioned the following were referred to: *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1); *Pirie* v. *Middle Dock Co.* (2); *Gordon* v. *Rimmington* (3); *City Fire Insurance Co.* v. *Corlies* (4); *Hahn* v. *Corbett* (5); *Bondrett* v. *Hentigg* (6); *Holtzman* v. *Franklin*

(1) (1887) 12 App. Cas. 484.
(2) (1881) 4 Asp. M. L. C. 388.
(3) (1807) 1 Camp. 123.
(4) (1839) 21 Wendell, 367.
(5) (1824) 2 Bing. 205.
(6) (1816) Holt, N. P. C. 149.

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Insurance Co. (1); Phillips on Insurance, 3rd ed. §§ 1097, 1115, 1127; McArthur's Contract of Marine Insurance, 2nd ed. p. 116; Meredith's Emerigon on Insurances, c. xii. s. 17, p. 351.

Cur. adv. vult.

1898. Jan. 24. GORELL BARNES J. This case raises certain novel and interesting questions of marine insurance law, and it is necessary that I should first state the facts which I find, and upon which I base my judgment.

The plaintiff and others, on whose behalf he sues, are the owners of the sailing ship *Knight of St. Michael*. On November 1, 1895, she was chartered by the owners to certain charterers to carry a cargo of coals from Newcastle, New South Wales, to Valparaiso at a freight of 15*s.* per ton payable on delivery. The plaintiff, on behalf of himself and the other owners, effected policies of insurance with the defendants for 2500*l.* upon the freight valued at 2500*l.* on the voyage in question. The policies were in the usual form, and the perils insured against included perils "of the seas, fire, jettisons, and of all other perils, losses and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of this insurance or any part thereof."

The cargo, consisting of 3206 tons of coal, was shipped at Newcastle in January, 1896, and the vessel sailed on her voyage from that port on February 1. On February 2 it was discovered that part of the cargo was hot, and that the heat was increasing rapidly; and thereupon the master, for the general safety of the ship, freight, and cargo, determined to put into the port of Sydney. The vessel was accordingly headed for Sydney, where she arrived on February 4. Surveys were held on the cargo at various dates, and the reports of survey set out in detail the steps taken with regard to the cargo. In the result 1706 tons of coal were discharged and sold upon the recommendation of the surveyors. The vessel finally sailed from Sydney about March 31 with the remaining 1500 tons of coal, which she delivered at Valparaiso. No

(1) (1833) 4 Cranch (C. Ct. U.S.) 295.

freight was paid or payable in respect of the coal sold at Sydney, and the plaintiff and his co-owners have lost that portion of the freight, amounting to 1338*l.* 2*s.* 4*d.*, which otherwise they would have earned under the said charterparty.

In the special case it is said that the defendants do not rely on unseaworthiness of ship, or on improper condition of cargo, as a defence to any claim there may be. If the action had been by the cargo owners against their underwriters for the loss of the coal, I presume that the claim would have been defended on the ground that the loss was due to the inherent vice of the coal; but the position of the shipowners with regard to the freight is different. I find that it was necessary for the safety of the whole adventure for the vessel to put into Sydney and discharge the coal landed there, and that it was reasonably certain that if she had continued on her direct voyage the temperature of the coal would have continued to rise until spontaneous combustion ensued, and that had she so continued the ship and cargo would in all probability have been destroyed by fire. I further find that the coal landed at Sydney could not have been reloaded and carried with safety to Valparaiso, and was necessarily and properly sold at Sydney. I also find that no part of the coal was ever actually on fire.

The owners of the vessel, being the persons interested in the freight which has been lost, now contend that this freight has been lost by perils insured against by the policies, and claim the right to recover directly from the defendants for the loss. The defendants, on the other hand, contend that there has been no loss of freight by perils insured against by the policies, and, although willing to concede that the freight lost was sacrificed to avert a probable loss by fire, and therefore should be made good in general average, they maintain that they are only liable for the share to be contributed in general average by the shipowners in respect of their interest in the freight.

These contentions raise the question whether, although no fire actually broke out on board the vessel, the defendants may be made directly liable for the loss on the ground that it was, in the circumstances, due to the operation of perils insured against, and not merely for the share of the loss which would

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Gorell Barnes J.

be borne by those interested in the freight if the loss should be adjusted as a general average loss.

It was formerly considered, in case of a sacrifice of property for the preservation of ship, freight, and cargo from losses for which underwriters would be liable, that the only liability falling upon the underwriters of the property sacrificed was to contribute their respective proportions to the amount required to make good the loss in general average; but it was decided in the well-known case of *Dickenson* v. *Jardine* (1) that underwriters are directly liable for a partial loss of the subject insured occasioned by a general average sacrifice, and that having paid the assured they are entitled to stand in his place with respect to the general average contribution; and it was further held, in *Price* v. *A1 Ships' Small Damage Insurance Association* (2), that such partial loss as aforesaid is not a particular average loss. The distinction drawn by the defendants between these cases and the present is that in the former the losses were proximately caused by perils enumerated in the policies. The goods in the first case having been jettisoned in order to avert an existing peril of the sea, and in the second the ship's materials having been cut away and cast overboard in order to avert a similar existing peril, whereas in the present case they contend that the loss was not caused proximately by an existing fire, but by the steps taken in consequence merely of fear of a fire breaking out. Cases were cited to shew that a loss caused by steps taken in consequence of fear of peril and not to avert an existing peril is not covered by an ordinary marine policy. It was not disputed that if fire had in any degree actually broken out, and the loss in question had happened to avert its consequences, the plaintiffs could recover directly from the defendants.

Now, I have found that fire did not actually break out, but it is reasonably certain that it would have broken out, and the condition of things was such that there was an actual existing state of peril of fire, and not merely a fear of fire. The case is peculiar, and not exactly analogous to that of any other peril. The danger was present, and, if nothing were done, spontaneous

(1) (1868) L. R. 3 C. P. 639. (2) (1889) 22 Q. B. D. 580.

combustion and fire would follow in natural course. In effect the concession of the defendants admits this, because they do not dispute their liability for the share of the loss in general average. But in order to give rise to general average there must have been imminent danger to ship and cargo—that is to say, real substantial danger. I have found that such danger existed in this case. Then does it make any difference that the fire had not actually broken out? I think not in the circumstances. There was imminent danger of fire, and an existing condition of things producing this danger, and if this cannot, strictly speaking, be termed a loss by fire, it is, in my opinion, a loss ejusdem generis, and covered by the general words "all other losses and misfortunes, &c."

This view is supported by the case of *Butler* v. *Wildman* (1), where a master of a Spanish vessel, in order to prevent a quantity of dollars from falling into the hands of an enemy by whom he was about to be attacked, threw the same into the sea and was immediately afterwards captured. It was held that it was a loss by jettison or by enemies, and if not strictly a loss by either peril it was a loss within the general words. Best J. said (2): "This loss comes within the general words of the policy. The use of these words is, to enlarge the construction of the terms by which particular losses are before mentioned, and to extend them to cases coming very near, but not precisely within the specified losses. Thus one of the losses particularly specified, is a loss by enemies. If there had been no general words, the loss by enemies might be said only to include an actual taking or destruction by the hand of the enemy, (although it may be observed that such a loss would fall within the other words, takings at sea, men-of-war, letters of mart and countermart); the general words, however, afford a complete answer to such an argument, by including all losses which are the consequences of justifiable acts done under the certain expectation of capture or destruction by enemies. The loss, in the present case, is the consequence of one of those justifiable acts." In further support of this view I may refer to the judgment of Kelly C.B. in *Stanley* v. *Western Insurance*

(1) (1820) 3 B. & Ald. 398. (2) 3 B. & Ald. at pp. 406, 407.

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Co. (1); Porter's Insurance Law, 2nd ed. p. 123; the Canadian cases of *McGibbon* v. *Queen Insurance Co.* (2) and *Harris* v. *London and Lancashire Fire Insurance Co.* (3); and the case of *Nobels Explosives Co., Limited* v. *Jenkins & Co.* (4)

I am therefore of opinion that the defendants are liable directly to make good to the plaintiffs the loss of freight as a partial loss under the policies. I may add that the case does not raise, and I am not asked to determine, any question as to the right of the defendants to deduct in settling the loss the amount which the plaintiff and his co-owners as owners of the ship are liable to contribute in general average towards the loss of freight.

Solicitors for plaintiff: *Batesons, Warr & Wimshurst.*
Solicitors for defendants: *Hill, Dickinson & Co.*

T. L. M.

1897
Dec. 14, 15.
1898
Jan. 24.

THE SERVIA—THE CARINTHIA.

Admiralty—Pilotage—"Proceeding" to Sea—Proceeding to Dock—Piloting to Landing-stage—"Extra" Services—Mersey Dock Acts Consolidation Act, 1858 (21 & 22 *Vict. c. xcii.*), *s.* 221.

The Mersey Docks and Harbour Board, as the pilotage authority for the port of Liverpool, has, under s. 221 of the Mersey Dock Acts Consolidation Act, 1858, power to fix, in addition to the ordinary compulsory pilotage rates, a reasonable charge by way of "extra" remuneration for a pilot, licensed by the Board, taking an outward-bound vessel from a dock alongside a landing-stage to complete her loading, as in the case of embarking passengers, their baggage, and the mails.

The Board has also power to fix an additional reasonable charge as "extra" remuneration (besides the charge per day for attendance whilst a vessel is necessarily lying in the river in the course of her navigation inward or outward) in the case of an inward-bound vessel taken by a pilot to a landing-stage to land passengers, baggage, and mails, before discharging the rest of her cargo in dock, including the case of vessels disembarking cattle and sheep at certain landing-stages in pursuance of the orders made under the provisions of the Diseases of Animals Act, 1894.

Semble, that, in the case of an outward-bound vessel, compulsory

(1) (1868) L. R. 3 Ex. 71, at p. 74.
(2) (1866) 10 Lr. Can. Jur. 227.
(3) (1866) 10 Lr. Can. Jur. 268.
(4) (1896) 1 Com. Cas. 436.

pilotage will not commence until the vessel proceeds from the stage to sea, and that, in the case of an inward-bound vessel, the employment of the pilot by compulsion of law will cease, or be suspended, as soon as the vessel deviates to the stage from the route which she would otherwise follow to the dock.

ACTION to recover the sum of 3*l.* by way of extra remuneration for certain pilotage services in addition to the ordinary pilotage rates levied for compulsory pilotage into and out of the port of Liverpool.

The plaintiffs were the Mersey Docks and Harbour Board, suing as the receivers and collectors of pilotage rates and earnings for the port of Liverpool, and Richard John Gore and Robert James Durrant, first-class pilots of the port of Liverpool. The defendants were the Cunard Steamship Company, Limited, owners of the steamships *Servia* and *Carinthia*.

On the morning tide of August 10, 1897, the plaintiff, Richard John Gore, piloted the outward-bound steamship *Servia* from the Canada Dock, Liverpool, into the River Mersey, brought her to an anchorage off the Prince's Landing-stage, and, about 4 P.M., navigated her from her anchorage to alongside the Prince's Landing-stage, where she embarked passengers with their luggage, and on the evening tide the plaintiff piloted the vessel out of the port of Liverpool.

On August 21 the plaintiff, Robert James Durrant, boarded, off Point Lynas, the inward-bound steamship *Carinthia*, laden with cattle, sheep, and other cargo, and piloted her into the port of Liverpool. About 2 A.M. on the following morning he navigated the vessel alongside the Wallasey Landing-stage, where she discharged the sheep, and then proceeded to the Woodside Stage, where she discharged the cattle, after which the plaintiff piloted the vessel to the entrance of the Canada Dock, but as, owing to her draught, she could not enter, she was taken by the plaintiff to an anchorage, and on the evening tide of August 23 he piloted the vessel into dock.

The defendants paid the pilotage rates outwards in respect of the *Servia*, and the pilotage rates inwards in respect of the *Carinthia*, together with, in the latter case, 10*s.* for two days' detention at 5*s.* per day; but the plaintiff Gore claimed in

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addition the sum of 1*l.*, and the plaintiff Durrant the sum of 2*l.*, as extra remuneration duly fixed by the Mersey Docks and Harbour Board, or alternatively, as reasonable remuneration, for taking the *Servia* and the *Carinthia* respectively to the landing-stages.

The defendants denied their liability for these two sums on the ground that taking the *Servia* to the landing-stage when outward bound, and the *Carinthia* when inward bound, was part of the compulsory pilotage service in respect of which the pilotage rates were levied, and that the Mersey Docks and Harbour Board had no authority to fix any extra remuneration for those services.

1897. Dec. 14, 15. *Joseph Walton, Q.C.*, and *Carver, Q.C.*, for the plaintiffs.

Boyd, Q.C., and *Maurice Hill*, for the defendants.

The arguments of counsel fully appear from the judgment. The material sections of the Mersey Docks Act Consolidation Act, 1858, are also there set out or sufficiently referred to. In addition to the cases mentioned in the judgment, the following were cited on the question, what constitutes "sailing" on the voyage: *Cockrane* v. *Fisher* (1); *Sea Insurance Co.* v. *Blogg* (2); Phillips on Insurance, 3rd ed. ss. 772 to 779.

Cur. adv. vult.

1898. Jan. 24. GORELL BARNES J. This is a test action brought to try the right of the Liverpool pilots to certain extra remuneration for piloting outward-bound steamers to the Prince's Landing-stage for the purpose of embarking passengers, and for piloting inward-bound cattle steamers to the Wallasey and Woodside Stages before taking them into dock. Pilotage is compulsory in the port of Liverpool for the vessels in question, and the point in the case is whether the alleged extra services are covered by the compulsory pilotage rates or are to be paid for in addition to such rates.

The pilotage of the port is regulated by the Mersey Dock Acts Consolidation Act, 1858 (21 & 22 Vict. c. xcii.), under

(1) (1834) 2 C. & M. 581.

(2) (1897) 14 Times L. R. 20.

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which the Mersey Docks and Harbour Board is constituted the pilotage authority, with power to license pilots. The Board is merely a formal party to these proceedings. The other plaintiffs are pilots licensed by the Board. One of them, Mr. Gore, was in charge of the defendants' steamship *Servia* on her outward voyage in August last, and the other, Mr. Durrant, was in charge of the defendants' steamship *Carinthia* on her inward voyage in the same month.

The following facts are taken from the evidence given, and admissions made, at the hearing before me.

First with regard to outward-bound passenger steamers. Prior to the year 1895 large passenger steamers sailing from the port of Liverpool for foreign ports loaded their cargoes in one of the wet docks of the port, and embarked their passengers in the dock or from tenders after the steamers left dock, and whilst lying in the River Mersey; but in that year the approach to the Prince's Landing-stage in the river was improved so as to enable steamers after leaving dock to come alongside the stage and there embark their passengers, and at the same time a station was erected on the quay adjoining the stage and connected by a line of rails with the London and North Western Railway system, and special trains have since that time conveyed passengers direct to the riverside station.

The practice of the defendants since 1895 with their steamers carrying passengers outwards is typical of that of most of the large lines with their outward-bound passenger steamers, though some lines do not use the stage. This practice, stated as accurately as the materials before me allow, is as follows: The defendants load their steamers in the Canada Dock some distance below the Prince's Landing-stage, and after a steamer's lading is completed she is generally taken out of dock on the high water preceding the afternoon of the day fixed for her departure, and, according to the state of the tide, then proceeds to an anchor, and thence to the Prince's Landing-stage, or direct to the stage. Sometimes, on account of neap tides, it is necessary for the vessel to leave the dock earlier and moor at the defendants' buoy in the Sloyne, further up river than the stage, before proceeding to the stage. The defendants are the

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only company possessing a mooring buoy in the Sloyne. The vessel reaches the stage shortly before the hour fixed for her departure, usually about 4 P.M. She is assisted alongside by a tug or tugs, and after making fast to the stage she embarks her saloon passengers and their baggage, and the mails, and sometimes receives on board some fine goods. From the stage she proceeds to sea. The time occupied at the stage is sometimes as long as four hours, sometimes not more than half an hour to an hour, and on the average about two hours. The steerage passengers generally embark by tender while the vessel is in the river at anchor or at the buoy, but sometimes in dock if the vessel goes direct to the stage.

About seven steamers per week belonging to different lines use the stage for the purpose of embarking their passengers, and about the same number use the stage for the purpose of disembarking passengers on their inward voyages. The case does not directly raise any question as to the pilot's remuneration for bringing inward-bound vessels to this stage, though I understand that this question is practically involved in that before the Court as to outward-bound steamers.

It is always a difficult operation to bring these large steamers alongside the stage, owing to vessels going in and out of dock and the other traffic in the river, and especially on strong flood or ebb tides. The steamers must always leave dock at high water, but they come alongside the stage at all times of the tide.

In the particular case of the *Servia*, she left the Canada Dock on August 10 last, on the morning tide, in charge of the plaintiff Gore, and anchored about abreast of the Prince's Stage. Shortly before 4.30 P.M. her anchor was weighed and she was brought alongside the stage under Mr. Gore's charge. There she embarked her saloon passengers, their baggage, and the mails, and thence she proceeded to sea on the same evening, through the Queen's Channel, bound for New York. Mr. Gore piloted the vessel to the outward compulsory pilotage limit at the North-west Buoy.

The defendants have paid the outward compulsory pilotage rate for Mr. Gore's services, and contend that such payment

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covers his service for taking the *Servia* to the stage. On the other hand, he claims 1*l.* for extra remuneration for the last-mentioned service. This sum has been fixed by the plaintiff Board as a regular charge to be made by pilots for bringing vessels to the stage for the purpose of embarking and disembarking passengers on the footing that their services in so doing are not covered by the compulsory pilotage rate. The charge has been paid in respect of all steamers using the stage in manner aforesaid in and since 1895. It is now disputed.

Secondly, with regard to inward-bound cattle steamers. For a number of years a very large trade has been carried on in the importation of live cattle and sheep into the port of Liverpool. The cattle and sheep are landed from the steamers by which they arrive at the Wallasey and Woodside Landing-stages, on the Birkenhead side of the Mersey, under the provisions of the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), and the orders made in pursuance thereof, fixing these stages for the purpose. There are rules made by the plaintiff Board for regulating the time, order, and manner for berthing vessels at the stages. These stages and a part of the Alfred Dock, Birkenhead, near the Wallasey Stage, are the only places in the port where the landing of live stock imported from abroad is permitted. The practice of the defendants, which is similar to that of other lines with regard to cattle steamers, is as follows:—

A pilot is taken off the port, and when the steamer enters the river orders are sent off to her as to berthing at the stages or the Alfred Dock. If the tide suits, and there are no steamers in the way at the stages, the vessel proceeds direct to the stage. If the tide does not suit, or there is no available berth at the stage, the vessel is anchored. If the vessel has both sheep and cattle she generally goes both to Wallasey and Woodside Stages, landing sheep at the one and cattle at the other, though sometimes both are discharged at the former stage. If she has only cattle she goes to Woodside or Wallasey Stage, or in some cases to the Alfred Dock, Birkenhead, where there is accommodation for both sheep and cattle. The arrangements depend on the room in the lairages. After landing the live stock, the vessel

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is taken direct into a dock if the tide serves, or to anchor, and then docked as soon as possible, and the rest of her cargo is discharged in dock.

About fourteen steamers per week belonging to different lines arrive with sheep and cattle. It is difficult to manœuvre the vessels alongside the stages, owing both to the traffic and tide. The assistance of a tug or tugs is required. The vessels are made fast to the stages, and it takes ordinarily an hour or an hour and a half to land the cattle, and one to three hours to land the sheep, though it was stated that longer times are occasionally taken, and that cattle ships had been three tides at the stages and finished in the Alfred Dock.

In the case of the *Carinthia* she was inward bound with cattle, sheep, and other cargo from America, and about 8.30 P.M. on August 21 last the plaintiff Durrant boarded her off Point Lynas, took charge, brought her into the river, and about 2 A.M. on the 22nd she proceeded in the usual way, first to the Wallasey Stage, where she discharged her sheep, and then to the Woodside Stage, where the cattle were landed. At 5 A.M. she was taken to the Canada Dock entrance, but owing to her draught was not permitted to enter, and was therefore anchored and lightened. She did not get into dock till the evening tide of the 23rd. Mr. Durrant was in charge throughout.

The defendants have paid the inward compulsory pilotage rate for Mr. Durrant's services, and 10*s.* for two days' detention while at anchor at 5*s.* per day. They contend that such payments cover all his services, but he claims 2*l.* for extra remuneration for taking the vessel to and from the two stages; 1*l.* for each stage is the regular charge fixed by the Board, in a similar way to that in the outward cases. This charge, which is now disputed, has been paid in respect of all cattle steamers using the stages since the user began, about fifteen years ago.

The questions raised turn upon the construction to be placed upon certain sections of the Mersey Dock Acts Consolidation Act, 1858, which render pilotage compulsory for outward and inward bound vessels, except coasting vessels in

ballast or under the burthen of 100 tons. Sect. 121 gives power to the Board to license persons to act as pilots "for the port of Liverpool." Sect. 123 imposes a penalty upon any person who shall pilot any vessel "into or out of the port of Liverpool" without a licence. Sect. 124 imposes penalties upon any pilot who "shall refuse to take charge of any inward-bound vessel upon a proper signal being made for a pilot, or of any outward-bound vessel upon the request of the master thereof." The sections dealing more particularly with outward-bound vessels are the 127th, 133rd, and 139th. Sect. 127, which is under a title "as to the duties of pilots," specifies the distances to which outward-bound vessels are to be piloted, but makes no mention of the point at which the pilot is to take charge. This point would ordinarily be the dock in which a vessel loaded, because, except in these cases of embarking passengers, a vessel would usually proceed from the dock to sea as fast as tide and weather would permit. Sect. 133 gives power to the board to fix rates of pilotage to be paid to pilots for piloting vessels within certain limits. The rate "for piloting a vessel out of the port of Liverpool" is to be "not less than 3*s*. and not more than 4*s*. per foot" draught of water. Sect. 139 provides that "in case the master of any vessel being outward bound," except the said coasters, "shall proceed to sea, and shall refuse to take on board or to employ a pilot," he shall still pay the full pilotage rate.

The material sections which relate to inward-bound vessels, in addition to the 124th, are the 125th, 128th, the 130th, and the 133rd. Sect. 125 imposes a penalty on any pilot refusing to conduct an inward-bound vessel. Sect. 128 defines the duties of the pilot in charge of an inward-bound vessel. It provides that "the pilot in charge of any inward-bound vessel shall cause the same (if need be) to be properly moored at anchor in the River Mersey, and shall pilot the same into some one of the wet docks within the port of Liverpool, whether belonging to the Board or not, without making any additional charge for so doing, unless his attendance shall be required on board such vessel while at anchor in the River Mersey and before going into dock, in which case he shall be entitled to

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receive 5*s.* per day for such attendance." There is nothing in any other section expressly extending these limited duties or preventing a pilot from making a charge for services performed beyond the limit, nor, on the other hand, imposing on the owners or masters of vessels any obligation to employ pilots to perform services other than the limited services specified in this section. Sect. 130 provides that in case the master "of any inward-bound vessel (except the said coasters) shall refuse to take on board or to employ a pilot, such pilot having offered his services for that purpose," he shall pay full pilotage rates as if the vessel had been piloted "into the port of Liverpool." Under s. 133 the rate for piloting a vessel from the distance of the Great Ormeshead "to the port of Liverpool" is fixed at not less than 5*s.* nor more than 8*s.* per foot draught of water, and from any greater distance "to the port of Liverpool" not less than 6*s.* nor more than 9*s.* per like foot.

There appears to be nothing in the Act rendering it obligatory to employ a pilot when a vessel is changing docks or coming from the docks on one side of the river to those on the other, or is navigated in the port, when not outward or inward bound, and the word "stage," according to the interpretation clause in the Act (s. 3), is included in the term "dock," though not in the term "wet dock" (see also s. 596, sub-s. (*c*), Merchant Shipping Act, 1894). The above-mentioned sections have been held to render pilotage compulsory for outward and inward bound vessels, except the above-mentioned coasters, and although the question in the case is in strictness not whether pilotage is compulsory while the services in dispute are being rendered, but whether these services are covered by the pilotage rates fixed in pursuance of s. 133, yet, on the argument before me, counsel had great difficulty in severing the two questions, because the sections are correlative, and the rates aforesaid are fixed for the compulsory services; so that if it is compulsory to employ the pilots for the services in question, the services would seem to be covered by the compulsory rates; but if the services are voluntary the rates fixed do not cover them.

The following cases, which are material, have been decided with regard to outward-bound vessels: In *Rodrigues* v. *Mel-*

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huish (1), a case under a previous Act, containing provisions very similar to those of the Act of 1858, where a ship in the service of the Post Office, and under contract to sail on December 4, 1853, left the docks on the 2nd with a pilot on board, and while lying at anchor in the river on December 3 an accident happened to the plaintiff's boat through the negligence of those on board the ship, the master not being on board and certain riggers being engaged in completing the vessel's rigging, it was held that the ship was not at the time proceeding to sea. From the judgment of Pollock C.B., it appears that if the vessel had been ready for sea and had left the dock with the intention of proceeding to sea, and no steps were being taken except those necessary for her to go on, she might have been considered to be proceeding to sea from the time she left the dock. In *The City of Cambridge* (2), where a vessel fully equipped and prepared for sea had left her dock in charge of a pilot, and was properly anchored in the river to wait for the tide, it was held that the ship was proceeding to sea within the meaning of s. 139 of the Act of 1858 at the time when she left the docks, and that the anchoring was not a discontinuance of her progress to sea, but an act proper and reasonable to be done in the course of it. *The Cachapool* (3) was a case where a barque had been towed out of dock into the river the previous day, in order that she might proceed to sea before daybreak in the morning on which a collision happened; but an accident having happened to her mainyard she was unable to proceed to sea as intended, and at the time of the collision was waiting in the river to have repairs executed, and it was held that she was not, at the time of the collision, proceeding to sea within the meaning of the said section.

There are the following cases relating to inward-bound vessels: *The Annapolis* (4), where a foreign vessel, bound for Liverpool, took a pilot off Point Lynas, was brought to anchor in the Mersey and lay there two or three days waiting, for want of water, to dock. She was then conducted by the same pilot into dock. In proceeding to the dock a collision was

(1) (1854) 10 Ex. 110.
(2) (1874) L. R. 5 P. C. 451.
(3) (1881) 7 P. D. 217.
(4) (1861) Lush. 295.

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occasioned by the pilot's default. It was held that the vessel was compulsorily in charge of the pilot, and was not liable for the damage. In the next case, *The Woburn Abbey* (1), an inward-bound vessel at anchor sheered or dragged into another, and it was held that her owners were liable. It does not appear from the report that the vessel was merely waiting for the tide, and I gather that Sir R. Phillimore considered the master was to blame for allowing the vessel to remain improperly moored. In his judgment he said that he was not considering the case of a ship only temporarily moored, with the object of shortly afterwards going into dock, but the case of a vessel moored by the pilot for such a length of time as caused him to be functus officio, so far as his compulsory employment was concerned. The last case relating to inward-bound vessels is *The Princeton.* (2) There a pilot, having been employed to pilot a ship from sea and take her into dock, piloted her over the bar, but owing to the state of the tide and weather she was obliged to anchor, and remain at anchor for two days, and whilst at anchor and in charge of the pilot she dragged her anchor and came into collision with another vessel. It was held that the collision was caused solely by the negligence of the pilot, but that his employment was compulsory, and the owners not liable. The grounds of the judgment of Sir R. Phillimore are that the ship was in itinere and in her progress to dock at the time of the collision, and was compelled to remain where she was by vis major. He said that if she could have gone into dock, but did not do so, he was not prepared to say that he should consider that she was entitled to the immunity which he was of opinion in the circumstances she was entitled to.

It is convenient to notice s. 138 here. It was held in *The City of Cambridge* (3) that this section does not relate to the giving of extra remuneration to those pilots only who are voluntarily engaged. The section provides for the remuneration of pilots voluntarily engaged to attend on vessels in the cases mentioned in the section, and for extra remuneration to

(1) (1869) 3 Mar. L. C. 240. (2) (1878) 3 P. D. 90.
(3) L. R. 5 P. C. 451.

pilots compulsorily employed, where delay in the navigation takes place compelling a vessel to remain in the river. It was contended before me that it provided for remuneration for such services as those in dispute at 5*s.* per day, and extended the compulsory services so as to include those in question, because of the words "attendance on board any vessel during her riding at anchor, or being at Hoylake, or in the River Mersey." In my opinion, however, this section does not relate to services rendered while a vessel is being actively navigated to the stage or stages for such purposes as these in question, but only to attendance on a vessel lying in the river or at Hoylake, as mentioned in the section. See *Attorney-General* v. *Case.* (1)

The Act of 1858, so far as the sections relating to pilotage are concerned, is loosely drawn, and these sections are somewhat confused. They appear to have been framed in relation to the known course of business at the port of Liverpool, which is for vessels to load and discharge their cargoes in the wet docks of the port. My review of the above sections and cases has led me to the conclusion that the principle which underlies the decisions is that, if an outward-bound vessel is loaded, equipped, and prepared ready for sea, and in that condition makes such progress to sea as tide and weather permit, from her point of starting on her voyage, she is proceeding to sea within the meaning of the Act; but that a vessel is not so proceeding to sea if, after leaving her dock, she remains waiting in the port for the purpose of performing operations which are necessary in order to complete her loading, or other preparations required in order to render her ready for sea, and, similarly, that an inward-bound vessel, if she cannot go direct into dock on her arrival in the river, is in course of progress to her dock, within the meaning of the Act, while she remains at anchor with the intention of docking as soon as tide and weather will permit.

The rates of pilotage referred to in s. 133 were, in my opinion, to be fixed to cover the duties which were to be performed by the pilots, in the one case for piloting outward-bound vessels from the time of their start ready to proceed to

(1) (1816) 3 Price, 302, at p. 321.

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sea, and, in the other case, for piloting inward-bound vessels from sea to dock, and, if need be, for anchoring them in the river till they can be docked. The 5*s.* a day extra is also to be paid for inward and outward bound ships in case of necessary delay in the navigation on the inward or outward progress.

It follows that for services which are not covered by the compulsory rates and the extra 5*s.* a day, the pilots ought to receive an extra reasonable remuneration. In the present case the outward-bound vessel, the *Servia*, although her equipment was complete, was not ready for sea until she had taken on board her mails and passengers and their baggage, and, in my opinion, the compulsory rate paid by the defendants for Mr. Gore's services did not cover the service rendered by him in taking the vessel to the Prince's Stage. So also the compulsory rate paid by the defendants in respect of the *Carinthia* did not, in my opinion, cover Mr. Durrant's services in taking the vessel to and from the Wallasey and Woodside Stages.

It was admitted that if reasonable extra charges could be made, the pilots were respectively employed on the terms that they should be paid such charges. The charges were fixed by the Board in pursuance of the 18th by-law, made under s. 221 of the Act of 1858, and there was no contest as to their reasonableness if they could be legally made. It was said that the importance of the case to the shipowners is that, if the plaintiffs are right in their contention, vessels proceeding to the stages are not under compulsory pilotage. My decision is only asked upon the question whether or not the pilots are to be paid extra if they are required to take vessels to the stages; but I do not shrink from saying that it may follow from my determination of this question in favour of the plaintiffs that vessels proceeding to the stages are not under compulsory pilotage while so doing. It was suggested in argument that this did not logically follow, and it is not necessary for me to decide that it does, though the reasoning of my judgment probably leads to this conclusion. The suggestion is founded on the cases of *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.* (1) and *The Charlton.* (2) These cases

(1) (1869) L. R. 4 Ex. 238. (2) (1895) 8 Asp. M. L. C. 29.

decided that where a pilot has been compulsorily taken on board and placed in charge of a ship, and then an accident happens while he is in charge in the district for which he is licensed, though outside the limits of the port in which he is a compulsory pilot, the shipowner is exempt from responsibility for the act of the pilot, on the ground that the relationship of master and servant does not exist, and that the exemption contained in s. 388 of the Merchant Shipping Act, 1854 (now s. 633 of the Merchant Shipping Act of 1894), does not require that the pilot should be compulsorily employed at the spot where the accident happens, but only that he should have been compulsorily employed within the district where it happens, and that the shipowners are within its protection. In each of these cases, however, the pilot was engaged to take the ship to a point beyond that at which the accident happened, and the shipowner had to pay a rate which covered his services to this further point. There are, however, obvious distinctions between these cases and the present, and I am unable to see how the principle upon which they were decided can apply to extra services not paid for by the compulsory rates.

It was further said that if this case were to determine that vessels are not under compulsory pilotage while the pilots are rendering services for which they are to receive extra pay great difficulty will arise in the master of a vessel determining whether he or the pilot is in charge. From what I have said, however, the difficulty will not arise with regard to outward-bound vessels; if the compulsory duties are treated as commencing at the time when the steamer proceeds from the stage to sea; and with regard to inward-bound vessels, if it follows from this judgment that it is not compulsory to employ a pilot to take a vessel to the stages the service for which extra charge is made would begin and the compulsion cease, or it may be would only be suspended, as soon as the vessel deviates to the stage from the route which she would follow in docking without going to the stage. It was also urged that as an inward-bound cattle steamer is compelled to go to the cattle stages—or one of them—to land her cattle and sheep before going into dock, unless she lands them in the Alfred Dock the

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pilot cannot take her into a wet dock direct, and must, therefore, take her to the stage or stages in order to earn his compulsory fee, except when she goes to the Alfred Dock; but the answer to this is that the compulsory rate is paid for bringing the vessel in and anchoring her if necessary, and then docking her, and that he is not responsible for the vessel having cattle or sheep on board, and that if he has to perform duties in consequence which are not provided for in the compulsory rate, and beyond those defined by s. 128 (the only section expressly defining the duties of the pilot of an inward-bound vessel), he must be paid extra for his extra services.

As this case only requires a decision upon the question of payment, and not a final determination of the question of compulsory employment of a pilot to take a vessel to the stages, I am not at present called upon to decide a further question which was discussed, namely, whether the interposition of services for which extra remuneration is to be paid puts an end to, or suspends, the services to an inward-bound cattle ship which are covered by the compulsory rate. It is sufficient for me on this claim to decide that if an inward-bound ship is taken to one or more stages her owners will have to pay the extra charge for each stage.

I have not felt disposed to arrive at my conclusions by any narrow construction of the Act. Although it is desirable that no difficulties should be placed by the Court in the way of trade developments and the navigation of vessels in the port, yet it is clear to me that the Act of 1858 did not contemplate pilots performing the duties they are now asked to perform, and receiving nothing more than the compulsory pilotage rates for them. These duties impose upon the pilots requested to perform them great additional responsibility and require the exercise of great care and skill, and it is only reasonable that they should be properly rewarded for performing them.

The case has been contested, as I understand, by the Liverpool Steamship Owners' Association in the name of the defendants, and it was stated that the matter of the payments to the pilots was not of so much moment as the question of compulsory pilotage during the services in question. I have dealt

fully with all the points taken, but may state that the broad view presented by the defendants' case is that the services in question of the pilots are requisite in order to enable shipowners to carry on what has become a regular course of practice with most passenger steamers, and as regards the cattle ships to comply with the provisions of the Diseases of Animals Act, 1894, and that these services should be treated as a necessary part of those which they are compelled to pay for under the Act of 1858, and that this Act should be so construed that the compulsory payments should cover all the services. According, however, to the opinion which I have expressed, this construction is wider than the terms of the sections of the Act bearing on the subject will permit. The questions in the case depend upon the construction of these sections, and not upon general considerations, and if I am right in my opinion an amendment of the Act will be necessary in order to carry out the object of the shipowners. My judgment is for the plaintiffs for the sum of 3*l.* with costs, and I certify that this was a proper case to be tried in the High Court.

Solicitors for plaintiffs: *A. T. Squarey, Liverpool.*
Solicitors for defendants: *Hill, Dickinson & Co., Liverpool.*

T. L. M.

1898
Jan. 24.

THE RUBY.

Admiralty — County Court — Jurisdiction — Practice — Judgment in rem — Warrant of Execution — Sale of Ship — County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *s.* 3, *sub-s.* 3; *ss.* 12, 23—*County Court Rules*, 1892, *r.* 42—*County Court* (*Admiralty*) *Forms*, *No.* 331.

After judgment in favour of the plaintiff, in an action in rem for damage by collision on the Admiralty side of a county court, a warrant of execution issued directing the high bailiff to "levy by distress and sale of the goods and chattels, including the steamship or vessel *Ruby*, of the defendant." Under this warrant the vessel was appraised and sold, but the registrar of shipping refused to register the bill of sale signed by the high bailiff except subject to an outstanding mortgage:—

Held, by Sir F. H. Jeune, President, that the power given to a county court by sub-s. 3 of s. 3 and s. 12 of the County Courts Admiralty Jurisdiction Act, 1868, "to try and determine" an Admiralty cause of damage by collision and enforce the decree "against the person or persons summoned," carried with it the power of rendering the plaintiff's maritime lien effectual against all persons having an interest in the res, and therefore, in order to obtain payment of the debt out of the proceeds, the high bailiff could sell the ship free from incumbrance.

Motion, on behalf of the high bailiff of the Bow County Court, in an action of damage by collision transferred to the High Court, for an order empowering him to execute a bill of sale of the steamship *Ruby* to a purchaser free from incumbrance.

The material facts were shortly as follows:—

The plaintiff, A. L. Sandford, on behalf of himself and others, owners of a skiff, commenced an action in rem, on the Admiralty side of the City of London Court, against the owner of the steamship *Ruby*, claiming 10*l.* 17*s.* 10*d.* for damage by collision, and on September 3, 1897, obtained judgment for 21*l.* 17*s.* 10*d.* debt and costs. The owner of the *Ruby*, C. N. Stewart, having made default in payment, a warrant of execution, dated September 11 and indorsed for 23*l.* 16*s.* 6*d.* (being the above amount with 1*l.* 18*s.* 8*d.* costs of execution), was issued, in the County Court Admiralty Form, No. 331, directing the high bailiff "to levy by distress and sale of the goods

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and chattels, including the steamship or vessel *Ruby*, of the defendant."

As the *Ruby* was lying in the West India Dock this warrant was, on September 15, executed by the high bailiff of the Bow County Court. On October 22 the vessel was appraised for 375*l.*, and on October 28 sold for 380*l.*, but the registrar of shipping at Newhaven refused to register the bill of sale, except subject to an outstanding mortgage for 415*l.* registered on September 2.

On November 5, on an application of the mortgagee for the payment of the proceeds to him after deducting the plaintiff's claim, the learned county court judge gave the mortgagee leave to intervene, and transferred the action to the High Court. On November 23 a receiving order was made against Stewart, the mortgagor, and on December 24 the mortgagee sold the vessel, under the power of sale contained in the mortgage, for 550*l.*, and registered the bill of sale, but, though the mortgagee tendered the plaintiff's debt and costs, the high bailiff refused to give up possession, and the mortgagee was, therefore, unable to deliver the vessel to the purchaser.

Butler Aspinall, in support of the motion. This is in effect an application for directions in the difficulty in which the high bailiff of the Bow County Court is placed by the refusal of the registrar of shipping at Newhaven to recognise the bill of sale. It is submitted, however, that on default of payment of the debt and costs by the owner of the *Ruby*, the sale of the vessel was the appropriate mode of giving effect to the judgment in rem pronounced in favour of the plaintiff's maritime lien by the judge of a county court having Admiralty jurisdiction. This Court will, therefore, declare that the sale made by order of the county court is free from incumbrance, and good against the mortgagee. This Court will also set aside the sale of the *Ruby* by the mortgagee, and as regards that sale, direct the registrar of shipping at Newhaven to vacate the register.

Lauriston Batten, for the plaintiff in the action, supported the motion of the high bailiff.

F. Laing, for the mortgagee. Admitting that the judgment in rem is good, and that it is founded on a valid maritime lien,

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taking precedence of the mortgage, still it is submitted that the property in the vessel being in the mortgagee, and the amount of the debt and costs having been tendered to the plaintiff, the mortgagee was entitled to exercise his power of sale, and the registrar of shipping was justified in registering the sale, as the mortgagee was the only person who could give a clean title against all comers.

It is further submitted that the registrar of shipping was right in refusing to recognise the sale by the high bailiff, for the only interest the judgment debtor had in the vessel was the equity of redemption, and that could not be taken in execution: *Metcalf* v. *Scholey*. (1)

Again, there is no jurisdiction on the Admiralty side of a county court to deal with mortgages of ships, and an examination of the rules (37 to 42) and forms, with reference to the procedure in a county court after judgment, shews that it was not the intention of the Legislature to confer on an inferior court the power to decree a sale by the high bailiff of a ship in proceedings in rem, except in the case of an unknown defendant, or in the case of a defendant not appearing when served; but to ensure a proper appraisement and sale, special facilities are afforded, under ss. 6 and 8 of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), for the transfer of the action to the High Court, where a competent and qualified official, the Admiralty Marshal, will carry out the decree of the Court in the best interests of all concerned, and under s. 29 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), the registrar of shipping would be bound to register the transfer.

The decree of a county court is not enforced against a vessel, but, under s. 12 of the County Courts Admiralty Jurisdiction Act, 1868, "against the person or persons summoned as the defendant or defendants in the same manner as the decrees of the Court are enforced in ordinary civil causes"—that is, the county court enforces its judgments by common law proceedings, and the warrant of execution issued under s. 23 of the Act is framed under s. 146 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), so as to be "in the nature of a writ of

(1) (1807) 2 Bos. & P. N. R. 461.

fieri facias"—that is, a common law execution limited on the face of it to the goods and chattels of the defendant, and the warrant was executed as a common law warrant, for it was sent, under s. 158 of the last-mentioned Act, to the high bailiff of the Bow County Court, the ship being within the common law jurisdiction of that court, though she was within the Admiralty jurisdiction of the City of London Court.

The sale by the high bailiff being invalid, the mortgagee is entitled to an order that, upon payment by him, or his purchaser, of the judgment debt and costs, the high bailiff shall deliver up possession of the ship.

Muir Mackenzie, for the trustee in bankruptcy of Stewart, the mortgagor of the *Ruby*.

[THE PRESIDENT. Any question between the trustee in bankruptcy of the mortgagor and the mortgagee must, if necessary, be decided in a subsequent application.]

Butler Aspinall, in reply. Sect. 3 of the County Courts Admiralty Jurisdiction Act, 1868, gives the county court "all powers and authorities relating" to the Admiralty jurisdiction conferred on it. These would include power to render its judgments in rem effective by sale of the ship, and the form of summons in an Admiralty action in rem (No. 319A) differs from the form of summons in personam (No. 320A) in stating that the action is against the ship. The form of warrant of execution (No. 331) is special as it contains instructions to fill in the "description and name of vessel," and so differs from the ordinary form (No. 164) "against the goods of defendant."

The bill of sale mentioned in rule 42 (1) to be executed by the high bailiff must be intended to be a valid bill of sale good against all the world.

THE PRESIDENT (SIR F. H. JEUNE). I can easily understand this question being raised, because I am afraid the effect of what happened has been that the sale has taken place for what may be supposed to be less than the value of the ship, and I am

(1) County Court Rules, 1892, Order XXXIX. B, r. 42: "On the completion of the purchase the high bailiff shall deliver up the property to the purchaser, and if required so to do shall execute a bill of sale to him at the expense of the purchaser."

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afraid also it took place without sufficient notice to the mortgagee. But it appears to me impossible to limit the jurisdiction of a county court sitting in Admiralty in the way suggested, because that would be to take from it a branch of jurisdiction which I think it was intended that it should possess.

There is no doubt an action in rem can be maintained on the Admiralty side of a county court, that is to say, an action which seeks to make the ship liable for a particular amount, in whomsoever's hands the ship may afterwards come. There is no doubt a judgment in rem can be given by the county court; but it is said that although there is power to entertain an action in rem and give an appropriate judgment, that still you cannot in the county court issue execution with the full effect of carrying out the terms of that judgment; that you are thrown back either to execute the judgment by warrant merely as a judgment of a court of common law, or to go to the High Court and carry out your county court judgment through the means of that tribunal.

I should require very clear language indeed in the Act of Parliament to convince me that a jurisdiction so peculiar as that in an action in rem was not intended to carry with it its well-known legal results. When the Act of 1868 is looked at, so far from finding any limitation of that kind, the words seem sufficiently ample to carry the whole of the jurisdiction which it appears to me it was intended to give. Sect. 3 gives all powers and authorities necessary to try and determine certain matters, among those being salvage, wages, and damage by collision, all of which carry with them a maritime lien. That, I agree, is limited to trying and determining, and I do not say that those words alone would necessarily carry with them the power to execute the judgment given under the provisions of that section. But by s. 12 the power is given in these words: "The decree of the county court in an Admiralty cause shall be enforced against the person or persons summoned as the defendant or defendants in the same manner as decrees of the said Court are enforced in ordinary civil causes, save and except as in this Act otherwise provided." Now, who are the person or persons summoned in an action in rem? Why,

all the owners—all the persons having an interest. Then s. 22 provides that there shall be no arrest or detention of the vessel in an Admiralty cause in a county court otherwise than in execution; so that it is clear that the vessel can be taken in execution in an Admiralty cause. Then s. 23 provides that for the execution of any decree or order of the county court in an Admiralty cause the Court may order, and any officer of any county court may execute, process according to the general orders provided. If it is desired, a transfer to the High Court may be obtained. That contemplates a sale in the county court just as in the High Court. It is, therefore, clear that you can have a sale in the county court in an action in rem just as in the High Court. The general orders seem to me to carry that out. Rule 42 provides that on the completion of the purchase the high bailiff shall deliver up the property to the purchaser and give a bill of sale to the purchaser. All that is complete machinery for a sale under actions in rem. What is there to shew that a warrant of execution is limited, and that it does not entail such an execution as a judgment in an action in rem ought to be followed by? I do not think there is anything. The only difficulty that presents itself to my mind is that when you come to look at the warrant of execution the form is not strictly appropriate to a judgment in rem. I think a form of that kind ought to have been moulded so as to follow the judgment in rem more accurately; but are the words of the warrant in the Form No. 331 enough? I think they are. They recite that the plaintiff has obtained judgment in the Court against the defendant for a certain sum. Then there is an order made to levy distress on the goods and chattels, including the ship *Ruby*, of the defendant, so that there is an order of sale of the goods of the defendant, including this particular ship. It appears to me that that is enough to make a good sale in this case.

It may be that the term defendants, if limited to owners, having regard to the provisions of the Merchant Shipping Act, might not include mortgagees, but an action in rem is brought against all the owners and persons interested. When you afterwards speak of the defendants in any of the subsequent proceedings of the Court, I think it must be intended to cover

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all those persons interested. The rights of any such persons who are not summoned are protected by the express power given to them to intervene. It may be, as it has been argued, and I daresay correctly argued, that the county court has not power to deal with mortgages; but the mortgagee has the power to intervene, and the action may be transferred to the High Court. It is also to be observed that probably in the majority of cases there would not be a mortgagee to intervene.

I think the judgment of the county court has all the effects of the judgment of the High Court as regards the power of sale; but the further question arises, what, under those circumstances, has to be done? It is pointed out that there are no express words declaring that the property is to be vested in any person to give a title, but the answer appears to me to be that neither is there in proceedings in the High Court. I think it must be taken that when the Court is empowered to give, and gives authority to one of its officers to sell a ship, that property is sufficiently vested in him to enable him to ask the registrar to act upon the authority which he has received.

There is only one point left, and that is the objection taken that it was the high bailiff of the county court of Bow who executed the sale. I think that is met by the 23rd section of the Act of 1868, which gives express power to any officer of any county court to execute such an order. In my opinion, therefore, all the points made against this sale fail, and I hold that the sale was good, and the ship must be registered in the name of the purchaser.

The proceeds will be brought into court, and the high bailiff and the plaintiff in the action must have their costs out of them. The question of the costs of the mortgagee and of the trustee in bankruptcy of the owner of the *Ruby* will be reserved.

Solicitor for high bailiff of Bow County Court: *George C. Tijou.*

Solicitor for mortgagee of the *Ruby*: *T. B. Williams.*

Solicitors for plaintiff: *J. A. & H. E. Farnfield.*

Solicitors for trustee in bankruptcy of owner of the *Ruby*: *Trinder & Capron.*

T. L. M.

THE RUBY (No. 2).

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Jan. 24.

Admiralty—Practice—Jurisdiction—Wages—Action in rem—Ship's Husband—Maritime Lien—Prohibition—Admiralty Court Act, 1861 (24 *Vict.* c. 10), s. 10—*County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict.* c. 71), s. 3, *sub-s.* 2.

A ship's husband, not being a "seaman" claiming "wages earned by him on board the ship" within the meaning of s. 10 of the Admiralty Court Act, 1861, has no maritime lien upon which he can found an action in rem for "wages" under s. 3, sub-s. 2, of the County Courts Admiralty Jurisdiction Act, 1868.

MOTION, on behalf of James Woodrow Matthews, mortgagee of the steamship *Ruby*, for a writ of prohibition directed to the judge of the City of London Court and to Walter Phillips to prohibit them from further proceeding in an action in which Walter Phillips was plaintiff and the owner of the *Ruby* defendant.

The facts were shortly as follows:—

Between July 17 and September 17, 1897, the plaintiff was employed, at 21*l.* per month, by the owner of the *Ruby* to act as his agent to superintend the running of the ship, and in that capacity he managed the business of the ship, advertised her, engaged the master, officers and crew, paid them their wages, obtained charters for the vessel, ordered the stores, paid and collected the accounts, attended to her outfit, and on three occasions, when the vessel was trading between Southend and Ostend, went in her to collect moneys due to the ship, pay disbursements, arrange for coaling, and look after the comfort of the passengers. The owner of the ship becoming bankrupt, the plaintiff, on October 27, commenced an action in rem in the City of London Court, under s. 3, sub-s. 2, of the County Courts Admiralty Jurisdiction Act, 1868 (1), for 42*l.* for wages as ship's husband.

(1) 31 & 32 Vict. c. 71, s. 3: "Any county court having Admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and determine, subject and according to the provisions of this Act,

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On November 1 the mortgagee intervened in respect of his registered mortgage on the vessel dated September 1, 1897; but on January 13, 1898, the learned judge of the City of London Court overruled an application on his part to strike out the action for want of jurisdiction, and, holding that the word "wages" included all kind of wages, gave judgment for the plaintiff for the amount of his claim with costs.

F. Laing, in support of the motion. The mortgagee is entitled to the writ of prohibition, for the plaintiff's claim does not fall within the term "wages" so as to give rise to an action under the Admiralty jurisdiction of a county court, and the judge had therefore no power to deal with the claim in an action in rem. The maritime lien upon which such an action must be founded will only arise when the claim is "by a seaman . . . for wages earned by him on board the ship." See s. 10 of the Admiralty Court Act, 1861.

A ship's husband is not a seaman. He has nothing to do with the navigation of the ship, and his wages are not earned on board the ship. If a ship's husband has a maritime lien for wages, that lien must extend over the whole fleet which he may be looking after on behalf of the owners.

[He was stopped by the Court.]

Lauriston Batten, for the plaintiff, contra. It lies on the applicant in prohibition to shew that the learned judge exceeded his jurisdiction, but there is nothing on the face of the proceedings to indicate this. The question depends on facts, namely, what were the duties of the claimant, and the learned judge having decided this point on the evidence, the High Court will not review his decision: *Brown* v. *Cocking*. (1) There is no definition of the word "seaman" in the Admiralty Court Act, 1861. It is, however, used in a very wide sense, for by s. 742 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), the word "includes every person (except masters, pilots, and apprentices) employed or engaged in any capacity

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the following causes (in this Act referred to as Admiralty causes):

* * * *

"(2.) As to any claim for . . . . wages—Any cause in which the amount claimed does not exceed one hundred and fifty pounds."

(1) (1868) L. R. 3 Q. B. 672.

on board any ship." In this sense it is not necessary that the claimant should have anything to do with the navigation, for a surgeon (1), a purser (2), a female acting as cook, stewardess, and caretaker (3), have all been held to have a maritime lien for wages entitling them to sue in rem.

The words "on board the ship" are not read strictly, for in *The Chieftain* (4) the master was held entitled to sue in Admiralty for his wages although the vessel was in dock, and he did not sleep on board and performed many of his duties on shore. In the present case the plaintiff did perform some of his duties on board, for he went three voyages in her on the business of the ship. In *Reg.* v. *Judge of the City of London Court and Owners of the Michigan* (5) it was held that, where a mate, after being paid off, remained and superintended the discharge of the cargo and the execution of repairs to the ship in port, the services were maritime, and the Court had jurisdiction. Wills J. said (6): "The right to proceed in rem for services rendered on board a ship apparently extends to every class of person who is connected with the ship as a ship, as a seagoing instrument of navigation, or of transport of cargo from one place to another, and to services rendered by such persons in harbour just as much as . . . . at sea."

THE PRESIDENT (SIR F. H. JEUNE). This claim is on the face of it a claim, in an action in rem, for wages as ship's husband, and the learned judge in the Court below appears to have held that, as a matter of law, the plaintiff had a maritime lien, and he therefore gave judgment for the amount of the claim; but was there anything to support this view? I think not. According to the particulars filed, the claim is in terms for wages as a ship's husband, and that, I think, raises the question, which can be decided on prohibition, whether a ship's husband, in the well-known and ordinary meaning of the

(1) *The Lord Hobart*, (1815) 2 Dods. 100. at p. 105; *The Wharton*, (1761) 3 Hagg. 148, n. (a).

(2) *Alleson* v. *Marsh*, (1690) 2 Ventr. 181; *The Prince George*, (1837) 3 Hagg. 376.

(3) *The Jane and Matilda*, (1823) 1 Hagg. 187.

(4) (1863) Br. & L. 104.

(5) (1890) 25 Q. B. D. 339.

(6) 25 Q. B. D. at p. 342.

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expression, can so claim. But if we look at what was proved the result is the same. From the evidence it is clear that the plaintiff's duties were the duties of a ship's husband, and that he made some voyages, not many, on the ship; but it does not follow that there was anything necessarily done on the ship. It may be that he incidentally performed some of those duties on board the ship.

The question, then, is, Does the plaintiff bring himself within the Admiralty Court Act, 1861? By s. 10 the claim must be "by a seaman of any ship for wages earned by him on board the ship." I agree that the word "seaman" may be extended to any person who is employed in the practical employment or management of a ship; but the gist of the matter is that the employment must be to do the work of the ship, and I think you may go a step further and say you must look at the nature of the employment, and see whether it is such work as is required to be done on board ship. I say that because in the case of *The Chieftain* (1) Dr. Lushington, when dealing with the case of a captain who was employed a great deal on shore, looked at the nature of his duties, and held that he was entitled to a lien for wages. But having regard to the character of the duties of the plaintiff in this case, I do not think that they are duties of the nature of those of a seaman even in the extended sense to be given to the term.

Under these circumstances the correct view seems to me to be that a ship's husband, acting as such, and employed as such, is not a person who comes within s. 10 of the Admiralty Court Act. I do not think that the case of *Reg.* v. *Judge of the City of London Court and Owners of the Steamship Michigan* (2) is at all contrary to that view, for there the person in question had been previously a mate of the vessel, and was still employed on the ship. Under these circumstances I am of opinion that there was no jurisdiction for the county court to entertain this claim, and that the prohibition must go.

Solicitor for mortgagee intervening: *T. B. Williams.*
Solicitor for plaintiff: *J. E. Harris.*

(1) Br. & L. 104.

(2) 25 Q. B. D. 339.

T. L. M.

[IN THE CONSISTORY COURT OF LONDON.]

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July 13, 30;
Nov. 26.

THE OFFICE OF THE JUDGE PROMOTED BY LEE *v.* HAWTREY AND OTHERS, CHURCHWARDENS OF ST. MILDRED, BREAD STREET, AND ST. MARGARET MOSES.

THE RECTOR AND CHURCHWARDENS OF ST. MILDRED, BREAD STREET, AND ST. MARGARET MOSES *v.* THE PARISHIONERS OF THE SAME.

Ecclesiastical Law—Jurisdiction—Criminal Suit against Churchwardens—Duty of Churchwardens to obtain Faculty before Removing Human Remains—The Burial Act, 1857 (20 & 21 *Vict.* c. 81), s. 23—*Faculty to carry out Directions in Order in Council for Preventing Vaults becoming Dangerous to Public Health.*

The churchwardens of a parish church wholly closed for burials, who, purporting to act under the provisions of an Order in Council under the 23rd section of the Burials Act, 1857, directing the removal and reinterment elsewhere of human remains underneath the church, do or cause to be done the acts therein directed without obtaining a faculty from the Ordinary, are guilty of an offence against the laws ecclesiastical, in respect of which they may be cited to appear to answer articles to be administered to them in a criminal suit.

The 23rd section of the Burial Act, 1857, provides (inter alia) that it shall be lawful for Her Majesty, upon the representation of one of Her Majesty's principal secretaries of State, by and with the advice of Her Privy Council from time to time, to order such acts to be done by or under the direction of the churchwardens or such other persons as may have the care of any vaults or places of burial, for preventing them from becoming or continuing dangerous or injurious to the public health, and such churchwardens or other persons shall do or cause to be done all acts ordered as aforesaid.

Orders in Council issued under the above section and served on the churchwardens of a parish church ordered that the churchwardens or the persons having the care of the vaults under the church should adopt or cause to be adopted the following measures, namely, that the whole of the human remains lying beneath the floor of the church should be removed, and reburied in a specified cemetery or in some other legal burial ground. In consequence of the service of these Orders in Council, the churchwardens, without having obtained any faculty from the Ordinary, pulled down all the pews in the church, took up the flooring and monumental slabs in the same, and removed certain coffins and human remains buried thereunder, for the purpose of reinterring them elsewhere. It appeared

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that burials in the parish had been by law wholly discontinued in the year 1853, and that since that year no burial was recorded to have taken place there:—

Held, that the acts of the churchwardens, not having been authorized by a faculty, were illegal, and the Orders in Council afforded no justification for what had been done by them: such Orders being either wholly ultra vires or to be construed as merely directing an application for a faculty to carry out their terms:

Held, also, that, on the petition of the rector of the parish church and the churchwardens, a faculty might issue authorizing for sanitary reasons the removal of the remains and their reinterment in consecrated ground.

IN this case, as originally brought before the Court, the office of the judge was promoted by Frederick Hugh Lee, the legal secretary of the Bishop of London, against Walter Hawtrey and Arthur Frederick Sturdee, churchwardens of the parish of St. Mildred, Bread Street, and Samuel White and Frederick Pratt Allerton, churchwardens of the parish of St. Margaret Moses, both parishes in the City of London, for having contravened the laws ecclesiastical by having, as churchwardens of the church of St. Mildred, Bread Street, the parish church of the two united parishes, without having been authorized by faculty, caused all the pews, seats, fixed furniture, fittings, and flooring, as well as the monumental slabs in the said church, to be removed therefrom, and "also several coffins containing human remains to be removed out of the vaults of the same church for the purpose of removing the same together with all other human remains buried beneath the said church to the Woking Cemetery or some other legal burial ground to be selected at their discretion, whether the same be consecrated or unconsecrated, for reinterment."

An affidavit to lead citation was brought into the registry on July 9 last. From this affidavit it appeared that two Orders in Council under the 23rd section of the Burial Act, 1857 (1),

(1) The 23rd section of the Burial Act, 1857, is in terms as follows: "It shall be lawful for Her Majesty, upon the representation of one of Her Majesty's principal secretaries of State, by and with the advice of Her Privy Council from time to time to order such acts to be done by or under the directions of the churchwardens or such other persons as may have the care of any vaults or places of burial, for preventing them from becoming or continuing dangerous or injurious to the public health: and every such

made, the earlier of the two in date on November 27, 1896 (1), and the later one, an amending order, on May 18, 1897 (2), had been issued and served on the respondents; that by the first of these orders it was ordered that the respondents, "or such other person or persons as may have the care of the vaults under the church of St. Mildred, Bread Street, do adopt or cause to be adopted the following measures, viz. (1.) that the whole of the human remains now lying beneath the floor of that church be removed and forthwith reburied in Ilford Cemetery; (2.) that the work of removal be carried out to the satisfaction of Dr. Sedgwick Saunders, the Medical Officer of Health of the City of London," and that by the Order in Council of May 18, 1897, it was ordered that the first directions contained in the first above-mentioned Order in Council should be read as if the words "Woking Cemetery or any other burial-ground where burial could legally take place" were substituted for the words "Ilford Cemetery."

It further appeared from the affidavit that after the issue of the Order in Council of May 18, 1897, it had been ascertained that the respondents, in consequence of being served with the Orders in Council, had removed all the pews, flooring, and monumental flagstones from the said church, and intended to remove all human remains from the church to some recognised place of interment, consecrated or unconsecrated; that the respondents absolutely declined to apply for any faculty, the same being in their opinion wholly unnecessary, and such an application as would prove their assent to an Order in Council the necessity of which they disputed; and that on inspection of the interior of the church on July 5 last it was found that, the whole of the seating and flooring of the church having then

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Order in Council shall be published in the *London Gazette*, and such churchwardens or other persons shall do or cause to be done all acts ordered as aforesaid, and the expenses incurred in and about the doing thereof shall be paid out of the poor-rates of the parish: Provided always that no such representation shall be made until ten days' previous notice of the intention to make such representation shall have been given to the churchwardens or other persons, or one of the churchwardens or other persons having the care of the vaults or places of burial to which the representation relates."

(1) Gazetted Dec. 1, 1896.

(2) Gazetted May 21, 1897.

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been removed, the work of disinterment was proceeding, and several coffins removed out of the vaults had been placed in boxes preparatory to removal.

July 13. *H. C. Richards*, on behalf of the promoter, moved the Chancellor of the Diocese of London (Dr. Tristram, Q.C.) to decree a citation to issue to the respondents to appear and answer to certain articles, heads, particulars, and interrogatories to be administered to them by virtue of the office of the judge, as set forth in the above-mentioned affidavit at the promotion of F. H. Lee. The Court has jurisdiction to issue the citation. The churchwardens have been guilty of an offence against the ecclesiastical law in respect of which they may be proceeded against in a criminal suit: *Adlam* v. *Colthurst* (1); and neither the 23rd section of the Burial Act, 1857, nor the Orders in Council made under that section relating to the church of St. Mildred, Bread Street, afford in law any justification for their acts. Their duty, as clearly shewn by the judgment of this Court in *The Rector and Churchwardens of St. Michael Bassishaw* v. *The Parishioners of the Same* (2), was on being served with the Orders in Council to apply to this Court for a faculty authorizing them to take such steps with regard to the remains buried in the church as they might think necessary. Moreover, in the present case the 23rd section has no legal application at all either to the churchwardens or to St. Mildred Church, and the Orders in Council are in truth ultra vires, and confer no power or authority on the churchwardens to interfere in any way with the church or the remains buried beneath it, for the church has been for very many years, i.e., since 1854, wholly closed for burial, and no one has now a right to be buried there. The church and the vaults therein are, therefore, not a place of burial to which the section in question can apply. [He referred to *Foster* v. *Dodd*. (3)]

[DR. TRISTRAM. Some evidence as to the vaults having been closed should be produced before the Court delivers judgment.]

(1) (1867) L. R. 2 A. & E. 30.
(2) [1893] P. 233.
(3) (1866) L. R. 1 Q. B. 475; (1867) L. R. 3 Q. B. 67.

Subsequently a further affidavit was filed on behalf of the promoter. This affidavit stated that by an Order in Council passed August 9, 1853, it was ordered that burials should be wholly discontinued in the parish of St. Mildred, Bread Street, and St. Margaret Moses from and after August 15, 1853, and that the last burial there recorded in the register of burials for that parish was on June 15, 1853.

Cur. adv. vult.

July 30. DR. TRISTRAM. On July 13 last, Mr. H. C. Richards moved the Court to decree a citation to issue at the suit of Mr. Frederick Hugh Lee of 1, The Sanctuary, Westminster, against the churchwardens of the united parishes of St. Mildred, Bread Street, and St. Margaret Moses, in the City of London, citing them to appear in this court to answer articles for having contravened the ecclesiastical law of England by pulling down all the pews in the parish church of St. Mildred, and by taking up the flooring and the monumental slabs in the church, and for removing certain coffins and human remains buried underneath the church, for the purpose of reinterring them in Woking Cemetery, or in any other burial ground where burials can legally take place, without having been authorized to take such measures by a faculty issued from this Court.

The application was supported by affidavits, by which it appeared that it was made with the sanction of the Bishop of London, and that the churchwardens justified their action on the ground that it was done under the authority of an Order of the Queen in Council addressed to and served upon them, and that consequently a faculty was unnecessary.

In this case there have been two Orders in Council issued under s. 23 of the Burial Act, 1857—an original one, and an amended one—and the question for the consideration of the Court now is whether this section is a sufficient authority for the issue of an Order in Council to churchwardens, investing them with uncontrolled power of pulling down all the pews and fittings in a church, of taking up and removing the flooring of the church, including any memorial slabs and monumental tombs therein, and of removing all human remains buried

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underneath it, whether in vaults or otherwise, to any cemetery or to any other burial ground, whether consecrated or unconsecrated, that they may select.

If this section is a sufficient warranty for the issue of an Order in Council conferring on the churchwardens power to do the acts complained of, unsanctioned by a faculty, it will be the duty of the Court to decline to issue the citation applied for. If it is an insufficient warranty, it will be its duty to decree that the citation issue.

The words of the section are as follows: [The learned Chancellor read the section.]

Before proceeding to consider whether this section is so worded as to warrant the issue of an Order in Council empowering the churchwardens to do what they have done without the sanction of a faculty, it is a matter for observation that, as I have observed in a former case—*The Rector, &c., of St. Michael Bassishaw* v. *The Parishioners of the Same* (1)—the Act in its preamble and its last section bears the impress of such marked carelessness in its drafting that it can be no matter of surprise to find that several of its sections, and, amongst others, section twenty-three, have, prior to this, been the subject of litigation.

There are several questions which it is incumbent upon the Court to consider before it decrees the citation to issue.

Firstly, whether, according to the cases coupled with the facts deposed to in the affidavits filed in support of the application, this Order in Council is ultra vires.

As to the cases. The construction of this section, and the effect to be given to it, have been the subject of well-considered judgments delivered in the Courts of Common Law and in the Rolls Court. In *Foster* v. *Dodd* (2) it was held by the Court of Queen's Bench in 1866, and in 1867 on appeal by the Court of Exchequer Chamber (3), that this section was only an authority for the issue of an Order in Council in reference to burial-places which were in use for the purpose of burial at the date of the Order, but not in reference to burial-places which at its date had permanently ceased to be used

(1) [1893] P. 233, at p. 242. (2) L. R. 1 Q. B. 475.
(3) L. R. 3 Q. B. 67.

for such purposes. Kelly C.B., in delivering judgment in the Court of Exchequer Chamber, said: "Vaults or places of burial," mentioned in this section, "must mean vaults or places applied to burial purposes *at the time the Order was made*, and these must be then under the care of churchwardens or other persons for the burial of the dead. . . . But we are of opinion that the statute applies, and that the authority of Her Majesty in Council can be exercised *only* where an existing burial ground is under the care of churchwardens, or other persons who have the charge of it, for the purpose of the burial of the dead."

It was, therefore, held by the judges in both Courts that an Order in Council issued in August, 1859, under this section, directing the persons who had the care of the Bridewell Burial Ground (in which persons had been buried according to the rites of the Church of England for 150 years prior to 1844, but which, since that date, had ceased to be used for burials, and had also been closed for burials by an Order in Council in 1854) to remove rubbish from it and to cover it with a layer of fresh earth, and to do other things therein mentioned to prevent it becoming injurious to health, was ultra vires, and that a subsequent Order made by the Home Secretary, dated September 15, 1859, under s. 1 of 22 & 23 Vict. c. 1, on the churchwardens of the parish of St. Bride, Fleet Street, in which parish the burial ground was situate, to do these acts, in consequence of the persons who had charge of the burial-ground having failed to do them, was also ultra vires, and that the churchwardens were liable to pay damages and costs to the owner of the burial ground in an action of trespass for complying with the Home Secretary's Order. Again, in the case of *Jacobson* v. *The Vestry of St. Pancras* (1), the vestry of St. Pancras, relying on two Orders in Council issued in 1864 and 1865 under this section, authorizing them to put in order a private burial ground adjoining the Whitfield Chapel, which had ceased to be used as such, and which had, by an Order in Council issued in 1853, been closed for burials, commenced to inclose it and lay it out as a garden. Whereupon Sir George Jessel, in the Rolls Court,

(1) (1880) 44 J. P. 184.

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upon the application of the owner of the ground, granted an injunction with costs against the vestry for so doing, saying: "The case of *Foster* v. *Dodd* (1) has clearly decided that the Act of Parliament under which the Orders in Council were issued applies only to places of burial de facto or de jure. At the date of the Orders in Council upon which the defendants rely, certainly this ground was not de facto a place of burial, for it is admitted that no burial had taken place in this ground for more than twenty years. Neither is it a burial ground de jure, for it is an unconsecrated place of burial, and no one has now a right of burial in it."

In the present case it appears on affidavit that by an Order in Council dated August 9, 1853, burials were directed to be wholly discontinued in the church of St. Mildred from and after August 15, 1853, and that the last burial in the church took place in June, 1853. So that, in the words of Sir George Jessel, this church was not a place of burial de facto at the date of the Order in Council relied upon by the churchwardens, neither is it a place of burial de jure, for after August 15, 1853, by the Order in Council closing it wholly for burials, no one had or now has a right of burial in it. So that, according to the decisions in these two cases, which have never been overruled, the Order in Council issued in this case is ultra vires, and the churchwardens in giving effect to it have acted illegally.

Lord Blackburn, at the commencement of his judgment in *Foster* v. *Dodd* (2), in the Court of Queen's Bench, observes that, in putting a construction on the following words in the 23rd section, "that it shall be lawful for the Queen in Council from time to time to order 'such' acts to be done by or under the directions of the churchwardens or such other persons as may have the care of any vaults or places of burial for preventing them from becoming or continuing dangerous to the public health," the word "such" preceding the words "acts to be done" must be left out of consideration "because it has no correlative," and that, consequently, an Order in Council issued under this section should be in terms limited to directing the

(1) L. R. 1 Q. B. 475; L. R. 3 Q. B. 67. (2) L. R. 1 Q. B. 475, at p. 484.

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attention of the churchwardens or person having the care of a vault or place of burial reported to be insanitary to the fact that it has been so reported, leaving it to them, should they have complete control of the vault or place of burial, to take steps to make it sanitary, or if they have not, to deliver the Order in Council to the person in whom such actual control or power is vested for him to direct the manner in which it is to be made sanitary.

In the present case the ultimate care of and control over the vaults and remains buried in the church of St. Mildred, Bread Street, is by ecclesiastical law vested, not in the churchwardens, but in this Court; and it was therefore the duty of the churchwardens, on receiving the Order in Council, assuming it to be of validity, to bring it to the notice of the Court for its direction by faculty as to the mode in which effect should be given to it. The present order in terms goes far beyond requiring the churchwardens to do this; for it directs all human remains buried in the vaults or otherwise underneath the church to be removed to other burial grounds, instead of leaving it to the Court to determine on inquiry whether such wholesale removal is necessary, or whether sanitation might not be effected at much less cost to the parish by concreting the floor of the church, or by a partial removal. It also leaves it in the discretion of the churchwardens to determine whether the remains on removal are to be interred in an unconsecrated or a consecrated burial ground, notwithstanding that by law a body once interred in consecrated ground can only be removed by faculty, and for the purpose of reinterment in other consecrated ground.

The next question for the consideration of the Court is whether this section was in the contemplation of the Legislature intended to be limited in its application to non-parochial vaults or places of burial belonging to religious bodies unconnected with the Established Church, and was not intended to apply to our cathedrals or parish churches and churchyards.

It is to be noted, that the most material and the vital part of this section is that which throws the cost of making an insanitary vault or place of burial sanitary on the poor-rates of the

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parish, in which it is situated. Such a provision was an appropriate and necessary one in respect of non-parochial places of burial. For in 1857, the date of the passing of this Act, there were a large number of private places of burial in different parts of the country unconnected with the Established Church, the owners or trustees of which had no permanent funds applicable for keeping them in order, and in the opinion of the Court this section was intended to apply to such cases only. As to the care of our parish churches and churchyards, on the other hand, the cost of keeping them in a sanitary state was in 1857, the date of this Act, legally chargeable on the church-rates, and the churchwardens were at that time compellable to make them sanitary, and to charge the cost of so doing on the church-rates by proceedings in the Ecclesiastical Courts.

There was, therefore, no reason for inserting in the Burial Act of 1857 a provision for throwing the cost of making sanitary our parish churches, our churchyards, nor yet our cathedrals, whose chapters were endowed with funds for that purpose, on the poor-rates, or for placing them for this purpose under the jurisdiction of the Home Secretary.

Moreover, the placing of them under the uncontrolled power of a Home Secretary involves a transfer of the exclusive jurisdiction which has been vested in the Ecclesiastical Courts for centuries over the fabrics of our cathedrals and parochial churches and chapels, as well as over our churchyards and the bodies buried therein, which could only be effected by the clear and express provisions of the Legislature.

That the Ecclesiastical Courts have exclusive jurisdiction over the fabric and fittings of our churches appears from the following amongst other cases. Lord Stowell, in *Maidman* v. *Malpas* (1), says: "There can be no question as to the jurisdiction of the Court, which is established by its own decisions, and those of the Temporal Courts, that no monument can be erected without leave of the Ordinary. . . . It is to his care that the fabric of the church is committed, that it should not be injured or deformed by the caprice of individuals." In *Jarratt* v. *Steele* (2) Sir John Nicholl, in

(1) (1794) 1 Hagg. Cons. 205, 208. (2) (1820) 3 Phillim. 167, at p. 169.

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the Arches, says: "All persons ought to understand that the sacred edifice of the church is under the protection of the ecclesiastical laws as they are administered in these courts." As to their jurisdiction over monuments and over bodies buried in churches and churchyards, in *Hutchins* v. *Denziloe* (1), Lord Stowell says: "as if a churchwarden should give orders to remove a monument, or a body, without a faculty he may be sued in the Ecclesiastical Courts." In the Common Law Courts it has been held, "That any nuisance in a churchyard is properly of ecclesiastical cognizance": *Quilter* v. *Newton.* (2) And Byles J., in *Foster* v. *Dodd* (3), in the Court of Exchequer Chamber, said: "A dead body by law belongs to no one, and is therefore under the protection of the public. If it lies in consecrated ground, the ecclesiastical law will interpose for its protection."

On the question whether or not the words of this section are sufficiently clear to effect such a transfer of jurisdiction, I adhere to what I said in my judgment in the *Case of St. Michael Bassishaw* (4): "It is, of course, competent to the Legislature to make such a transfer; but according to the cases this cannot be done without a clear and explicit expression by the Legislature that such was its intention. Sir Benson Maxwell, in his work On the Interpretation of Statutes, 2nd ed. p. 158 (3rd ed. p. 183), following the language of the cases he cites, says: 'As it is presumed that the Legislature would not effect a measure of so much importance as the ouster or restriction of the jurisdiction of the Superior Court without an explicit expression of its intention, so it is equally improbable that it would create a new jurisdiction with less explicitness; and therefore a construction which would impliedly have this effect is to be avoided; especially when it would have the effect of depriving the subject of his freehold, or of any common law right, such as the right of trial by jury, or of creating an arbitrary procedure. It has been said that the words conferring such a jurisdiction must be clear and unambiguous, and that an inferior court is not to be construed into a jurisdiction . . . .

(1) (1792) 1 Hagg. Cons. 170.
(2) (1690) Carth. 152.
(3) L. R. 3 Q. B. 67, at p. 77.
(4) [1893] P. 233, at p. 240.

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However, effect must, of course, be given to the intention where the Act, without conferring jurisdiction in express terms, does so by plain and necessary implication.' "

The words used in this section giving the Home Secretary unlimited power over any vaults or places of burial which are reported to him to be insanitary are not, in the opinion of the Courts, sufficiently clear and explicit to effect such a transfer of jurisdiction.

But there is a further objection to such an extended operation being impressed upon the words of this section.

Heretofore the fabrics of our cathedrals, the tombs and monuments therein, and the remains buried in the vaults therein, have by law been under the exclusive care and protection of the cathedral chapters, subject to an appeal from their acts in reference thereto to the bishop of the diocese, as visitor of the cathedral, and from the bishop's decision to the Judicial Committee of Her Majesty's Privy Council; and the fabrics of our parish churches, and the pews, fittings, and vaults therein, and the parish churchyard, with the vaults, graves, and bodies interred therein, have been under the protection and exclusive jurisdiction of the Ecclesiastical Courts of this country from shortly after the Conquest up to the present day, so much so that by law no material alteration can be made either in a church or churchyard, or any human remains removed from any vault or grave in either, except under the authority of a faculty decreed by the Ecclesiastical Courts, obtainable, as regards alterations in a church or churchyard, only after the parishioners, as being interested therein, have been cited; and as regards the removal of human remains, only after the representatives (if known) of the deceased person have been cited or had notice of the proposed removal, thereby giving the parties interested (if so minded) in both cases an opportunity of opposing the granting of the faculty, and, in the case of the removal of remains being decreed, also of the right to superintend the same, and of selecting the place and site of their reinterment.

The acceptance of the interpretation that is now being attempted to be placed on this section of the statute would

deprive chapters and parishioners of their legal rights, and subject their private rights to the autocratic will of a Secretary of State, from whose directions, when formally embodied in an Order in Council, there is, in the opinion of the Court of Exchequer Chamber, as delivered in *Foster* v. *Dodd* (1), no appeal or redress. But, according to a well-recognised rule on the construction of statutes, such an alteration in respect of private rights cannot be effected by statute unless made in plain and unambiguous language, which is not to be found in this section. The rule is thus stated by Bowen L.J. in *Mansfield* v. *Mansfield* (2), that in the construction of statutes "you must not construe the words so as to take away rights which already existed before the statute was passed, unless you have plain words which indicate that such was the intention of the Legislature."

On the several grounds stated the Court decrees that the citation issue. But as the question raised on the motion is one of some novelty and of considerable importance, and as an appeal lies from this order to the Court of Arches—and from thence to the Judicial Committee of Her Majesty's Privy Council—the issue of the citation may be deferred until the churchwardens have decided on the course they are prepared to pursue in respect of the order now made.

A citation in pursuance of the above judgment having issued and been returned duly executed, an appearance thereto was entered for the respondents on August 30 last; but before the articles in the suit had been filed the rector of the united parishes of St. Mildred, Bread Street, and St. Margaret Moses and the respondents presented a petition praying that the Chancellor of the Diocese of London would decree a faculty to issue authorizing the petitioners to proceed to the removal of the human remains buried underneath the church of St. Mildred, Bread Street, as directed by the above Orders in Council, and that the petitioners might for the purpose of such removal do such acts and things as they might consider necessary for the purpose of carrying out such Orders in

(1) L. R. 3 Q. B. 67. (2) (1889) 43 Ch. D. 12, 17.

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Council; they undertaking to make good all damages to the church caused by such removal. (1)

Nov. 26. The petition came on to be heard before the Chancellor of the Diocese of London.

E. C. Scott, for the petitioners, moved for the faculty.

A solicitor appeared for the promoter of the criminal suit, and, having regard to the circumstance of the respondents therein having applied for the faculty, asked that the criminal suit might be dismissed on the costs incurred therein being taxed and paid by the respondents.

Scott. The respondents also ask that the suit against them be dismissed, and undertake to pay the costs incurred by the promoter.

The rector and one of the churchwardens were examined in support of their petition. The result of their evidence appears from the following judgment.

DR. TRISTRAM. The Court is of opinion, on the evidence produced, that on sanitary grounds it is desirable that all the remains buried underneath this church should be removed and reinterred in other consecrated burial grounds. It therefore decrees a faculty to issue to the rector and churchwardens authorizing them to take steps to remove them, and to reinter them in a consecrated portion of the Woking Cemetery, with the exception of the remains of Mr. Charlesworth, which at the request of a relative will be reinterred in Littleworth Churchyard, near Hertford Heath, and of the remains of Mr. William Billing, which by a like request will be reinterred in a consecrated portion of the Kensal Green Cemetery. Separate faculties will issue for the removal of the remains of Mr.

(1) The petition alleged (inter alia) that at a joint vestry of the united parishes held on September 20, 1897, the following resolution was passed: "That the churchwardens proceed to obtain a faculty, and do all that is necessary to carry out the Orders in Council, and get the church reopened for divine service with as little delay as possible."

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Charlesworth and Mr. Billing. The churchwardens were in error in taking down the pews and fittings of the church without the sanction of a faculty; and, on ascertaining that it had been inspected with a view to applying for an Order in Council for the removal of remains, they should have applied at once to the Court for a faculty to authorize such removal, so far as it might be proved to be necessary for the sanitation of the church. By adopting this course they would have been in a position to produce evidence before the Court to enable it to determine whether it was desirable that there should be a removal of the whole or only a portion of the remains. In some cases, by effectually concreting the whole of the surface of the church, the necessity of removing any of the remains may be obviated. In other cases, by concreting some vaults, it may be necessary only to remove a portion of the remains. In the present case, on the evidence, it is clearly advisable that all of the remains should be removed. There has been a grave irregularity in this case on the part of the contractor in opening vaults and removing coffins without a faculty, which by law he was not justified in doing.

The proceedings by articles promoted by the direction of the Bishop of London against the churchwardens, for disturbing the remains interred in the church without being authorized to do so by faculty, are dismissed, with costs against the defendants. The Court will certify that the costs incidental to obtaining this faculty are fairly chargeable on the poor-rates.

Solicitors for the promoter in *Lee* v. *Hawtrey*: *Lee, Bolton & Lee.*

Solicitor for all other parties appearing: *G. H. Steinberg.*

C. F. J.

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Jan. 17, 18, 19;
Feb. 9.

THE RIPON CITY (OTHERWISE THE SILVIA).

Admiralty—Ship—Sale—Pre-existing Maritime Liens—Division of Purchase-money—Mortgagees of Shares.

The managing and majority owners of a vessel, as vendors, handed over the possession of her to a Scottish firm under a contract of sale by which the firm were to become owners of the shares in the vessel in proportion to the instalments of the purchase-money paid. The firm paid a sum on account of the purchase-money against which eight shares in the vessel were transferred to them. These shares the firm mortgaged. In working the vessel the firm incurred liabilities which, in an action in rem by the master, were held to have created maritime liens on her (*The Ripon City*, [1897] P. 226), and, after entering into an onerous charter for the vessel, the firm became bankrupt. The vendors resumed possession of the vessel, gave bail in the above-mentioned action, paid the amount subsequently adjudged to be due, paid a sum to cancel the charter, repaired the vessel, settled with the minority owners, and, with the acquiescence of the mortgagees of the eight shares, sold her to a foreign purchaser. In an action by the mortgagees against the vendors in respect of the distribution of the proceeds of the sale :—

Held, by Sir F. H. Jeune, President, that as against the mortgagees the vendors could not, before dividing the purchase-money, deduct a proportion of (1.) the sum paid to clear off the maritime liens, as there had been no request from the mortgagees and they were not at the time of the payment in possession; (2.) the sum paid to cancel the charter, as the mortgagees, not being in possession, were not liable for expenses connected with the working of the ship; (3.) the cost of repairs, as it was not proved that they had been executed in pursuance of the agreement for the sale of the vessel to the foreign purchaser.

Johnson v. *Royal Mail Steam Packet Co.*, (1867) L. R. 3 C. P. 38, and *The Orchis*, (1889) 15 P. D. 38, distinguished.

MOTION, by mortgagees of shares in the *Ripon City* (otherwise the *Silvia*), in objection to the registrar's report allowing (inter alia) a deduction in the distribution of the proceeds of the sale of the ship of a sum on account of pre-existing maritime liens.

The following summary of the material facts is taken from the judgment and the report of the registrar.

On October 10, 1895, Furness, Withy & Co., as managing owners of the steamship *Ripon City*, entered into an agreement with Neil, M'Lean & Co. of Glasgow, the legal effect of which

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—as modified by two letters and as interpreted by the learned judge—was that Furness, Withy & Co. remained the owners of the vessel until they should have themselves acquired all the shares in the ship, and Neil, M'Lean & Co. were to become owners of the shares transferred to them in proportion to the instalments of the price of 8000*l.* to be paid within a period of five years.

At the time of the contract of sale the registered owners were: Sir Christopher Furness, one share; Furness, Withy & Co. (managing owners), fifty-nine shares; Joseph Holland, one share; John Mills, one share; W. H. Bland, one share; Thomas Ronaldson, one share.

In pursuance of the agreement the possession of the *Ripon City* was transferred to Neil, M'Lean & Co., who proceeded to work her, and in October, 1896, paid 1000*l.*, part of the purchase-money, against which Furness, Withy & Co. transferred eight shares in the vessel to them. On November 4, Neil, M'Lean & Co., in consideration of an advance of 500*l.*, mortgaged four of these shares to J. W. Donald, Limited, and, on November 7, the other four shares were mortgaged for 500*l.* to Mrs. Elizabeth Balls, a plaintiff in the present action, and the mortgage was registered on November 20. The mortgage of the first four shares was registered on February 1, 1897, and, on February 4, transferred to R. K. Donald, another plaintiff in the present action. On February 2, 1897, Neil, M'Lean & Co. suspended payment, and Thomson McLintock, a plaintiff in the present action, was appointed sequestrator of the estate according to Scottish bankruptcy law. On February 5, Furness, Withy & Co. resumed possession of the vessel, and thereupon correspondence ensued between them and Mrs. Balls and R. K. Donald, the effect of which, in the opinion of the learned judge, made no material alteration of their legal position as mortgagees out of possession.

Whilst the vessel was in the possession of Neil, M'Lean & Co. liabilities were incurred, including a claim for wages and disbursements by the master, and on February 17, 1897, he issued a writ in rem claiming 1900*l.*, for which amount Furness, Withy & Co., without the knowledge of the plaintiffs

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in the present action, gave bail, paid into court 83*l.* 0*s.* 3*d.*, the amount of the master's claim for wages, and on March 24 paid the master, as the plaintiff on the record, 400*l.* in settlement of that action. On May 6 Gorell Barnes J. held that the settlement of the action was void as against the real plaintiffs, Cory & Co., who had supplied coals to the vessel in respect of which bills had been drawn by the master and dishonoured by Neil, M'Lean & Co., and the learned judge gave judgment in the action (1) against the ship for 1243*l.* 14*s.* 6*d.*

On April 9, 1897, Furness, Withy & Co. paid 325*l.* for the cancellation of a disadvantageous charter entered into by Neil, M'Lean & Co., and on March 1 entered into a contract for the repair of the vessel. On April 17 they sold the vessel to Paolo Viale of Genoa for 8650*l.*, of which 4000*l.* was to be paid in cash and the balance by acceptances, subject to the completion by the vendors of the repairs which the vessel was undergoing in order to pass No. 3 survey. The vessel was then delivered to the purchaser, the registry closed, and her name changed to the *Silvia*.

On July 5, 1897, Green, Holland & Sons, as representing Joseph Holland, deceased, the owner of one share, and Thomas Ronaldson, the owner of one share, commenced the present proceedings by issuing a writ in rem, claiming a declaration that the sale was null and void, that an order might be made for the possession of the ship to be given to the plaintiffs, that the registry might be rectified, and for damages. In this action, in which the Italian purchaser appeared as defendant, Furness, Withy & Co. intervened and paid 400*l.* into court. This sum the plaintiffs accepted in satisfaction of their claim, but an order having been made amending the writ by adding the two mortgagees, Mrs. Balls and R. K. Donald, and the sequestrator, Thomson McLintock, as plaintiffs, the action went on in their names. On August 7 a decree was, by consent, made to the effect that the plaintiffs should be deemed to assent to the sale, and that judgment should be entered against the interveners, and their bail, in favour of the three remaining plaintiffs for one-eighth of 8650*l.*, namely, 1081*l.* 5*s.*, with

(1) *The Ripon City*, [1897] P. 226.

interest thereon at 10 per cent. per annum from April 17 to August 7, and 4 per cent. on the amount finally to be found due, from that date until payment, less such deductions as the interveners might be able in law to establish as proper from the respective shares and interests of the plaintiffs.

At the reference before the registrar and merchants the interveners claimed to deduct various sums amounting in all to 5541*l.* 17*s.* 11*d.*, including 795*l.* 5*s.* 7*d.* shipbrokers' disbursements at Glasgow, 325*l.* paid to cancel the charter, 400*l.* paid to the master to settle his action against the ship, 2171*l.* 18*s.* 2*d.* cost of repairs. These items were all disallowed, the first two on the ground that they did not create any lien on the ship, and that a mortgagee out of possession is not liable in respect of the expenses of working the ship or of cancelling a charter; the third on the ground that Gorell Barnes J. had held that the settlement of the action was illegal and void; and the fourth on the ground that a mortgagee not in possession is not liable for outlay incurred in improving the mortgaged property; and though by the terms of the contract of sale the sellers agreed "to complete No. 3 survey, and hand certificate to purchaser," the sum claimed as a deduction included repairs required owing to the ship having been on fire (the contract price for passing No. 3 survey being only 840*l.*), and all the repairs had been in fact nearly completed before the date of the agreement for sale, and had not been undertaken with a view to that particular sale; but the learned registrar allowed 216*l.* 5*s.*, brokers' commission of 2½ per cent. on the purchase-money, as a reasonable and proper deduction, and, on the ground that it "was a debt for which there was an existing lien at the time of the sale of the ship," he allowed a deduction of 1281*l.* 0*s.* 2*d.*, and costs, paid by Furness, Withy & Co., on May 28 as the amount found due to the master in his action against the ship for wages and disbursements.

The plaintiffs now moved to disallow, first, the brokers' commission, on the ground that if the mortgagees had realized their security they would have been entitled to add the brokerage to their principal and interest; and, secondly, the amount paid in the master's action, on the ground that, as bail had been given

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in that action by the interveners and the vessel released, no maritime lien existed at the time the mortgagees were to be assumed to be constructively in possession by assenting to the sale or becoming plaintiffs in the present action. The interveners entered a cross-motion in respect of the items disallowed by the registrar, and at the hearing supported the registrar's report allowing the two above-mentioned sums; but in respect of the items disallowed, mainly contended for the allowance of the sum paid for the cancellation of the charter, and the cost of repairs to the ship.

1898. Jan. 17, 18, 19. *F. Laing*, for the plaintiffs, the two mortgagees of four shares each, and the sequestrator of the estate of Neil, M'Lean & Co. (1)

Aspinall, Q.C., and *Dawson Miller*, for the interveners.

The arguments of counsel fully appear from the judgment. In addition to the cases there mentioned the following were cited: *Liverpool Borough Bank* v. *Turner* (2); *The Rose* (3); *The Innisfallen* (4); *Edmunds* v. *Wallingford* (5); *Batthyany* v. *Bouch* (6); *The Maxima*. (7)

Cur. adv. vult.

Feb. 9. THE PRESIDENT (SIR F. H. JEUNE). The questions in this case arise on objections to a report made by the learned registrar in pursuance of a judgment of the Court, given by consent, and relate to the distribution of the proceeds of the sale of a vessel called, at the time of the sale, the *Ripon City*. [The learned judge then dealt with the facts already set out, and continued:—]

The deductions now in question, which were claimed in

(1) The sequestrator had no real interest in the result of the action, as the mortgages more than absorbed any sum out of the proceeds payable in respect of the eight shares belonging to the mortgagors, Neil, M'Lean & Co. The owners of the other two shares in the ship, John Mills and W. H. Bland, took no part in the proceedings.

(2) (1860) 1 J. & H. 159; 2 De G. F. & J. 502.

(3) (1873) L. R. 4 A. & E. 6.

(4) (1866) L. R. 1 A. & E. 72.

(5) (1885) 14 Q. B. D. 811.

(6) (1881) 4 Asp. M. L. C. 380.

(7) (1878) 4 Asp. M. L. C. 21.

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argument before the registrar and before me, are, I think, divisible under four heads.

First, the sum of 216*l.* 5*s.* claimed as brokerage at 2½ per cent. of the purchase-money. This sum has been allowed by the learned registrar, and I think rightly. The effect of the decree by consent was, in my opinion, that Mrs. Balls and Mr. R. K. Donald, whom I will speak of as the plaintiffs, are to be treated as acquiescing in the sale as a sale, but with the reservation of all rights as to distribution of the proceeds, the gross sum realized being 8650*l.* It was argued before me that the plaintiffs, as mortgagees, could on a sale add their costs of it to their claim on the purchase-money, and should be permitted to do so now. No doubt the plaintiffs could do this as against their mortgagor, but not as against the owners of other shares in the ship.

Secondly, the most important question in this case arises with regard to the maritime liens on the ship which were cleared off by the interveners. The learned registrar has allowed the deduction of the amounts secured by lien which were paid by the interveners to Messrs. Cory in consequence of the decision of Gorell Barnes J., and also of Messrs. Cory's costs, on the ground that this lien was in existence at the time of the sale to the Italian purchaser. But there appears to me to be no distinction between the different maritime liens imposed by the conduct of Neil, M'Lean & Co., and the case is the same as if the interveners had, instead of giving bail, then paid all such liens. There is thus but one question of law involved, and to this counsel for the interveners addressed their main argument. They contended that, on the true construction of the transaction between the interveners and Neil, M'Lean & Co., the interveners ceased to be owners and became either mortgagees, or at least unpaid vendors with a security for payment of the purchase-money; that they took possession in order to enforce their security; that they could not enforce their security by sale without clearing off the maritime liens on the ship; and so, having not indeed relieved the mortgagees of the eight shares from personal liability, but having relieved their property from a prior incumbrance, they were entitled to

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deduct what they had paid in respect of the liens from the purchase-money received by them before dividing it. I have considered the agreement of October 10, as modified by the letters of the same date and of November 22, 1895, and it appears to me clear that the property in the vessel never passed to Neil, M'Lean & Co., nor could specific performance ever have been enforced, as the interveners were never in a position to sell the whole ship.

The position of things, I think, was that for the original intention of the whole ship being transferred to Neil, M'Lean & Co., and the interveners becoming mortgagees for the unpaid purchase-money, there was substituted an arrangement under which the interveners, until they acquired all the shares, remained the owners, except in so far as on proportionate payment there was a transfer of shares, Neil, M'Lean & Co. being in the meantime allowed to work the vessel. It confirms this view to find that in their pleadings in the present action the interveners describe themselves as at all times owners of the vessel, and their argument before Gorell Barnes J. in *The Ripon City* (1), proceeded on the basis of their being the owners, and not Neil, M'Lean & Co. It was contended before me that Gorell Barnes J. held that the interveners were the mortgagees, and Neil, M'Lean & Co. the owners of the ship; but it is clear to me that the language of the learned judge has been misapprehended on this point. He held that a maritime lien could attach to a vessel by reason of the acts of Neil, M'Lean & Co., and without there being any personal liability on the part of the interveners, just as the act of a mortgagor left in possession of a vessel may impose a lien on her in priority to the rights of the mortgagee. It was in this sense, and in this sense only, that the learned judge used the expression (2): "So that practically the buyers were owners, and the sellers were in a similar position to that of mortgagees in respect of the purchase-money remaining unpaid."

For the purposes of this case, however, it does not appear to me material whether the interveners are to be regarded as mortgagees or as owners in the position I have described. In

(1) [1897] P. 226. (2) [1897] P. at p. 246.

one view they may be regarded as owners of the equity of redemption in regard to the plaintiffs' mortgages, because they had a claim against Neil, M'Lean & Co. for any surplus after the discharge of those mortgages. But they may also be regarded as having rights resembling those of a mortgagee, and so being in a somewhat similar position to that of the plaintiffs; their legal position cannot, I think, be put higher than that. Further, it is clear that they were not personally liable on the liens discharged by them, and that to free their interests in the ship from these liens it was necessary to free the plaintiffs' interests as well, but that the plaintiffs did not expressly request them to discharge those liens. The question is, have they under these circumstances, on any legal principle, a right to claim that the amount of the liens paid off by them shall be deducted from the purchase-money before division, and so have a proportion of the expense incurred by them thrown on the plaintiffs? The argument of counsel for the interveners was based on a contention that this payment might be treated as a payment at the implied request of the plaintiffs, and he relied on the authorities of *Johnson* v. *Royal Mail Steam Packet Co.* (1) and *The Orchis.* (2) It was decided in the former of these cases that the mortgagee of a ship, who, in order to obtain her release from a maritime lien for wages, paid that claim, was entitled to recover the same, on an account for money paid, against the owners by whom the ship was managed, and who were personally liable for the wages. The ground of the decision was that the sum was paid by the plaintiff in that case under compulsion, and in respect of a liability imposed on the defendants. The same principle was carried further in the case of *The Orchis* (2), where it was held by the late President, and by the Court of Appeal, that a mortgagee of forty-eight sixty-fourth shares in a ship who paid to the master a sum for which he had a maritime lien, was entitled to recover it against the owners of the other sixteen sixty-fourth shares; the ground of the decision being the several liability for the amount both of the mortgagors and the other owners. But what was, I think, an essential feature in those cases, the personal liability of the

(1) L. R. 3 C. P. 38. (2) 15 P. D. 38.

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defendants to pay the sum which the plaintiff was considered to be compelled to pay and did pay, is wanting in the present instance. It is true that by the satisfaction of a maritime lien the property of every mortgagee is relieved from what, so long as it remains, is a prior charge, but a request by the mortgagee for the payment off of the lien is not to be inferred for that reason. It may be reasonable enough, if there be personal liability for a debt, to infer that the person liable desires and impliedly requests its discharge. But it is a further step, and one I believe erroneous, to contend that where there is no liability, but only the bare fact of benefit to property, a similar request is to be implied. People cannot be forced to buy even certain benefits against their will. In the present case, too, the benefit was doubtful. If the ship had sold for enough to provide for the lien and the mortgages, and there is evidence to shew this was at least contemplated as possible, the plaintiffs, as mortgagees, would have gained nothing by the discharge of the lien.

I have considered whether the satisfaction of this lien might not be treated as money paid to keep the property in existence, like the payment of premiums on policies of insurance. The analogy, however, seems to me imperfect, because different considerations may arise in the case of a payment necessary to preserve a property in existence, from one which only relieves it of a burden. But were the analogy more complete than it is, I think that the decision of the Court of Appeal in *Falcke* v. *Scottish Imperial Insurance Co.* (1) has finally dispelled the inferences connected with the employment of the term "salvage" in earlier cases, and decided that the payment of premiums by the owner of the equity of redemption in a mortgaged policy gives him no prior right, and that payment of premiums confers such a right only on one or other of the principles enumerated by Fry L.J. in the previous case of *In re Leslie* (2)—principles which have no application in the present instance. Nor does the practice of the Admiralty Court appear to me to afford any guide in the matter. It has always been held that a person advancing money to the master to pay wages

(1) (1886) 34 Ch. D. 234. (2) (1883) 23 Ch. D. 552.

has been allowed to claim in priority for his advance, but this is, I think, because he is considered to be identified with the master. It is true also that a bottomry bond holder who discharges a claim for wages becomes entitled to priority in respect of such payment; but this is only when he has been allowed by the Court to make it.

I have also endeavoured to see whether the present case may not be considered as analogous to that of the holder of an equity of redemption who pays off a first mortgage with the intention of keeping it alive as against mesne incumbrances. I take the general principle of equity to be as laid down by Jessel M.R. in *Adams* v. *Angell* (1), the decision of which case was afterwards approved by the House of Lords in *Thorne* v. *Cann* (2): "Now in a Court of Equity it has always been held that the mere fact of a charge having been paid off does not decide the question whether it is extinguished. If a charge is paid off by a tenant for life, without any expression of his intention, it is well established that he retains the benefit of it against the inheritance. Although he has not declared his intention of keeping it alive, it is presumed that his intention was to keep it alive, because it is manifestly for his benefit. On the other hand, when the owner of an estate in fee or in tail pays off a charge, the presumption is the other way, but in either case the person paying off the charge can, by expressly declaring his intention, either keep it alive or destroy it. If there is no reason for keeping it alive, then, especially in the case of an owner in fee, equity will, in the absence of any declaration of his intention, destroy it; but if there is any reason for keeping it alive, such as the existence of another incumbrance, equity will not destroy it."

In the present case there was no doubt strong reason on the part of the interveners for keeping alive the charge enforceable by lien, and no doubt, also, the interveners could have taken an assignment of the rights of the lien-holders whom they paid off to a trustee, or even perhaps to themselves. But is there enough, or indeed anything, beyond the fact of the payment off, to shew that the interveners in giving bail, which I have

(1) (1877) 5 Ch. D. 634. (2) [1895] A. C. 11.

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treated as equivalent to paying off the maritime liens, intended to keep them alive for the purpose of maintaining a priority for such payment as against the mortgagees? I cannot think that there is. The interveners, when they gave bail, probably did not believe in the validity of the arrest; but, in determining to put an end to it, I think that their real object, or at least an obvious and sufficient object, was to keep the conduct of the sale of the ship in their own hands, and so certainly obtain the brokerage, and probably get a better price for the vessel, instead of allowing her to run the risk of being condemned by the Court and sold by auction; and they did this, no doubt prudently enough, for their own benefit, partly as holders of at least fifty-two sixty-fourths of her, and partly as entitled to claim against Neil, M'Lean & Co. anything their equity of redemption of the eight shares might produce. It would be a mere fiction, I think, to suppose that it was intended to keep the liens alive for any purpose. I can, therefore, discover no ground on which the interveners can claim a priority over the mortgagees for any of their payments in discharge of liens.

Thirdly, when the interveners took possession of the *Ripon City* she was under a charterparty made by Neil, M'Lean & Co. This charterparty was of an onerous kind, and accordingly the interveners on April 9, 1897, paid 325*l.* for its cancellation. It is contended that before that date both Mrs. Balls and Mr. R. K. Donald had become mortgagees in possession. This turns on certain correspondence which passed between the interveners, Mrs. Balls' solicitor, and Mrs. Balls herself. There is no doubt that in this correspondence Mrs. Balls' solicitor spoke of her as "mortgagee now in possession of four shares," and the interveners accepted that statement in their replies. But it is clear to me that on the side of Mrs. Balls there was misapprehension of the possible effect in law of the language employed, and on the side of the interveners there was misapprehension of the legal effect of Mrs. Balls becoming a mortgagee in possession; and, on the whole, I am of opinion that no act was done by or on behalf of Mrs. Balls which made her a mortgagee in possession. I come to the same conclusion as to Mr. Donald, the evidence with

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regard to his case being of the same character, but somewhat weaker than that with regard to Mrs. Balls. But, whether they took possession or not, neither Mrs. Balls nor Mr. Donald gave any express authority to pay anything for the cancellation of the charter—though Mrs. Balls was aware that its cancellation was intended, and consented to it—and in the absence of any such authority I do not think that the interests of either of them can be held liable.

Fourthly, the remaining point turns on the claim to make deductions in respect of the repairs to the vessel. This clearly must be limited to the cost of any repairs done in consequence of the promise in the agreement for sale to the Italian purchaser. I think such costs should be deducted if it could be proved that they were incurred after, and in pursuance of, the agreement for sale. But I agree with the finding of the learned registrar that no such proof has been given, and I have no doubt that the repairs were practically completed before the agreement for sale.

I am of opinion, therefore, that the only deduction to be allowed is the claim for brokerage (216*l.* 5*s.*), and the account must be reformed accordingly. The plaintiffs, of course, cannot have more than the amount of their mortgages and interest. I think that the plaintiffs are entitled to the costs of the action, of the reference before the registrar, and of these objections.

Solicitors for plaintiffs: *Ince, Colt & Ince.*

Solicitors for defendant and interveners: *William A. Crump & Son.*

T. L. M.

1898
Feb. 18, 19.

THE MADRAS.

Admiralty—Towage—Contract, Construction of—Complete Performance prevented by a Misfortune beyond the Control of either Party—Subsequent Salvage.

The plaintiffs, tug-owners, contracted to tow the defendants' vessel from Kingroad in the River Severn to Sharpness Dock for a fixed sum, but when near their destination, owing to a fog and without anybody being in fault, the vessel stranded on a rock, and could not be got off:—

Held, by Sir F. H. Jeune, President, that the contract was indivisible, and, not having been fulfilled, the plaintiffs were not entitled to recover on a quantum meruit for any portion of the towage.

Appleby v. *Myers*, (1867) L. R. 2 C. P. 651, followed.

After the stranding and failure of the attempt to get the vessel off, the tugs were ordered by the master of the vessel to keep her where she was so as to prevent her drifting up the river and sinking in deep water or doing damage. These orders the tugs obeyed; and in the result the vessel was sold where she lay, but the greater part of the cargo of timber being taken off in lighters, the freight was earned by the shipowner:—

Held, that this was a salvage service, and on a total value of 2724*l.* the owners, masters, and crews of the three tugs engaged were awarded 370*l.*

Action of Towage and Salvage. The plaintiffs were the owners, masters, and crews of the steam-tugs *White Rose*, *Royal Briton*, and *Activ*. The defendants were the owners of the ship *Madras*, her cargo and freight.

The case is reported on the question of the effect of complete performance of a contract to tow being prevented by a misfortune beyond the control of either party.

The material facts were shortly as follows: On November 14, 1897, about midnight, the steam-tug *Royal Briton*—of 98 tons gross register, engines of 75 horse-power nominal, seven hands, and of the value of 3500*l.*—took the *Madras*—a wooden sailing ship of 1739 tons net register from St. John's, New Brunswick, to Sharpness, Gloucester, with twenty-four hands and a cargo of deals—in tow off Nash Point in the Bristol Channel, and towed her to Kingroad, where she anchored about 8 A.M. the next day, and remained waiting for orders. The towage to Kingroad was under a separate contract, which was not disputed.

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The *Royal Briton* left the vessel at Kingroad and went to procure assistance. On November 21 she returned with the tug *Activ*, of 30 tons register, engines of 55 horse-power nominal, a crew of six hands, and of the value of 2500*l*. The two tugs towed the *Madras* to Northwick, where she was moored about 5 P.M. and lightened. A third tug was then procured, the *White Rose*, of 125 tons gross register, engines of 75 horse-power nominal, eight hands, and valued at 4500*l*. On November 22, about 4 P.M., the weather being hazy and the flood-tide running at about seven knots, the three tugs proceeded to tow the *Madras* towards Sharpness, the *Royal Briton* towing ahead, the *White Rose* and the *Activ* being lashed on the starboard and port sides respectively.

In about an hour and a half they arrived within a short distance of the entrance to Sharpness Dock, where the *Madras* was slewed round, head upon tide, and waited whilst another ship went into dock. At this time a dense fog came on, and, in the course of the subsequent manœuvres to approach the new dock entrance, the *Madras* took the ground, about the top of high water, with her forefoot fast on a rock, and began to make water. Early the next morning a fourth tug, the *Red Rose* (separately settled with), assisted the plaintiff tugs, and, after lightening the vessel and ineffectual efforts to get her off, the master decided to keep the vessel where she was. For this purpose two and at times three of the tugs were used from November 24 to 28, and they prevented her being swept higher up the river by the strong tide, and sinking in deep water or doing damage. For this latter service the tugs claimed salvage remuneration.

A considerable portion of the cargo was saved by being discharged into lighters, but the vessel was condemned by surveyors as a total wreck. She was sold where she lay, and realized 357*l*. 2*s*. 6*d*., the small portion of cargo in her fetching 5*l*. The cargo taken out realized 782*l*. net, the freight earned was 1582*l*., and the Court fixed the total value for salvage purposes at 2724*l*. The expenses to which the tug-owners were put in the performance of the service are mentioned in the judgment.

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The agreement for towage, as found by the Court, was that the plaintiffs, the owners of the *Royal Briton*, should, in consideration of the defendants paying the tariff rate of 1*s.* 2*d.* per registered ton, and 10*l.* extra for stopping at Northwick, tow the *Madras* from Kingroad into Sharpness Dock, and supply two other tugs. On payment of this inward towage the vessel to be towed back to Kingroad free of further charge.

The defendants denied that any remuneration was due to the plaintiffs for towage, on the ground that the towage agreement had not been carried out; and they denied that the plaintiffs were entitled to a salvage award on the ground that the services of the tugs were unsuccessful and conferred no benefit on the defendants, as the ship was sold where she lay, and the cargo was delivered by lighters. Alternatively, the defendants paid 180*l.* into court in satisfaction of the plaintiffs' claim.

Aspinall, Q.C., and *F. Laing*, for the plaintiffs. The towage from Nash Point to Kingroad was performed, and, being a separate contract, must be paid for in any event. The second part of the contract was to tow from Kingroad to Sharpness, and that was, in effect, performed, for the shipowners were able to deliver the cargo and so earn the freight. If this part of the towage is to be deemed not to have been completed, still it was through no fault of the plaintiffs that they did not quite perform it. They were ready and willing to complete it, but were ordered to keep the vessel where she was and not let her get off. Further performance of the contract was, therefore, prevented by the act of the defendants, and the plaintiffs are entitled to claim the contract price as due, or at any rate a proportionate amount for the portion of the towage actually performed.

The subsequent services in keeping the vessel where she was, and standing by, were salvage services performed at request, and were the means of preserving valuable property, as, if the tugs had not obeyed the orders given and prevented the vessel from slipping off into deep water, not only might the ship and cargo have been altogether lost, but serious damage caused by

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the ship drifting up the river and fouling the Severn railway bridge. For this service the tugs are entitled to a salvage award.

Pyke, *Q.C.*, and *D. Stephens*, for the defendants. The claim for towage from Nash Point to Kingroad, and waiting there, is not disputed; but the plaintiffs are not entitled to anything for the subsequent towage from Kingroad to Sharpness. They failed to perform that part of the agreement. It became impossible of fulfilment through no fault of the defendants: *Appleby* v. *Myers*. (1) After the vessel grounded, the subsequent towage by the plaintiffs was made in an ineffectual endeavour to fulfil their contract, and for that they cannot claim salvage. If the tugs were negligent in the performance of their duty, and so got the ship ashore, even though they succeeded in rescuing the vessel from the position of danger, they could not claim salvage: *The Robert Dixon* (2); but, assuming that there was no breach of duty on the part of the tugs, still they cannot claim as salvors, for nothing was saved by their exertions. The ship was sold for what she would fetch where she lay, and the cargo was taken off in lighters. Again, assuming that there was no breach of duty on the part of the tugs, and that they received orders from some one in authority on board the *Madras* to assist in keeping the ship where she was, then at the utmost the service performed at request consisted in standing by, for which the customary charge is 6*l.* a tide.

[The cases of *The Lady Flora Hastings* (3), *The Renpor* (4), and *The Edward Hawkins* (5) were referred to.]

Aspinall, *Q.C.*, in reply.

THE PRESIDENT (SIR F. H. JEUNE). In this case there is a claim for towage to be decided as well as a claim in the nature of salvage.

The claim for towage to Kingroad is admitted, but that from Kingroad to Sharpness is disputed, and with regard to that

(1) L. R. 2 C. P. 651.
(2) (1879) 5 P. D. 54.
(3) (1848) 3 W. Rob. 118.
(4) (1883) 8 P. D. 115.
(5) (1862) Lush. 515.

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portion of the towage it is necessary to consider both the law and the facts. In the first place, there can, I think, be little doubt what the contract really was. I do not think the contract can fairly be considered to be a contract to tow to a point near Sharpness. I think it was towage into the dock. There has been evidence given to that effect, and I think it a reasonable view to take of the matter. It is not governed by the actual words of the tariff which has been produced, for that only indicates the rate payable. It is clear that the contract to tow into Sharpness Dock was not fulfilled, and that, owing to the circumstance that a fog came on, by the fault of no one the vessel stranded on a rock. If the matter had stopped there that would have been a simple question of an indivisible contract which cannot be fulfilled owing to circumstances for which neither party is to blame. Under those circumstances I think there could be no question that the law holds neither party liable to fulfil that contract, or liable to consequences for not fulfilling it. I think it is the case substantially of *Appleby* v. *Myers* (1), and follows closely the analogy of cases as to freight, and those cases where the contract, not severable in its nature, is entered into as a whole and cannot be completed through no fault of any one, and neither party has any rights against the other—subject, of course, always to this, that if there is a new contract to be implied by the acts of the parties, that gives rise to new rights. In this case I do not think there can be any question of a new contract.

There is one further consideration which renders it necessary to decide a further fact in the case, which otherwise I think might have been passed by. If it were the case that the request made by the vessel or those in authority was not to tow the vessel off, but to keep her where she was when she might have been towed off, then the tugs would be entitled to towage, because it would be the act of the other party which prevented them from fulfilling their contract. But on the whole of the circumstances of the case I do not think the facts arise which that contention involves. The true state of facts appears to

(1) L. R. 2 C. P. 651.

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me to be that when the vessel first got on there was an attempt made to tow her off. I cannot doubt that, looking at the statement in the log of the *Royal Briton*. I do not doubt that on that first evening, and perhaps on the following morning, an effort was made to tow her off, and it was abandoned, having failed through no fault of the tugs or ship, but by reason of the circumstances in which she was placed—part of the inevitable accident which occurred. Later, I have no doubt, the state of things changed. When it was found that she could not be got off, or, if she could, would be waterlogged, it was thought best to keep her where she was, in order that the cargo might be removed as easily as possible. I have very carefully considered this part of the case with the assistance of the Trinity Masters, and their view is that the reasonable conclusion to come to—and I think, on the whole of the facts, the proper conclusion—is that, although it was at first intended to tow her off, when that was found to be a failure it was determined not to attempt any more to tow her off, but, on the contrary, to use all available means, including the services of the tugs, to hold her in her then position. The state of things was, therefore, that to which I have adverted—namely, a contingency not caused by the fault of any one, rendering it impossible to fulfil the contract. If that be so, I am afraid the result must be that for the towage from Kingroad to Sharpness the tugs cannot recover anything.

Now comes the question of salvage. It seems to me to be indifferent whether the claim is put forward purely as a salvage matter, or whether it is put as acts done at request. I have no doubt that everything done in the way of towing was done distinctly at the request of persons in authority, and therefore that would give rise to a claim in the nature of salvage. The action of the tugs in keeping the vessel where she was did, in effect, enable freight to be earned, and did preserve some of the cargo. I have considered with the Trinity Masters what would have been the result if the vessel had drifted out and had not been so held. I think that the dockmaster's view is substantially the correct one, and that, though it is possible that the vessel might have drifted and struck the Severn Bridge,

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and have been, with her cargo, totally lost, probably that would not have been the result. The view of the dockmaster that she would more probably have stuck on a shoal in the river, and so in a position worse, but not very much worse, than that where she had grounded is, in my opinion, the correct view. The Trinity Masters also point out another consideration which in their view has weight. They point out that water-logged as she was it is by no means impossible or improbable that she might have capsized. Under those circumstances the cargo might have been lost, and I think when the matter is looked at as a salvage operation some good was effected, though it can hardly be said very much good, because in point of fact the vessel was in such an unfortunate position that any advantage to her could only be slight. I therefore think the tugs are entitled to moderate remuneration for the service they did. They were occupied for some time but not exposed to any risk. It has been suggested that remuneration should be given on the basis of the remuneration given to the *Red Rose*; but I do not think that that is a governing factor at all. Taking all matters into consideration—including the item of 24*l.* 10*s.* 6*d.* for swinging the ship, the loss of two hawsers, and the charges for pilots on the tugs—I have come to the conclusion that having regard to the fact that the total value of the ship, freight and cargo was only 2724*l.*, the proper remuneration to give to the three tugs will be the sum of 370*l.*

Solicitors for plaintiffs: *William A. Crump & Son, for Vachell & Co., Cardiff.*

Solicitors for defendants: *Holman, Birdwood & Co., for Osborne, Ward, Vassall & Co., Bristol*

T. L. M.

[IN THE COURT OF APPEAL.]

C. A.
1898
Feb. 15, 16.

THE GLENGYLE.

Admiralty—Salvage—Salving Vessels specially equipped—Salved Vessel saved from certain Total Loss—Principles of Assessment of Award—Amount.

After a collision between two steamships, outside Gibraltar Bay, one of them commenced to settle down. Her passengers and crew were transferred to the other vessel, and, her distress being notified from the signal station, two steamers belonging to the plaintiffs, of the value of 22,000*l.* and 20,000*l.* respectively, specially built, maintained, and equipped, with steam up night and day, for salvage purposes on the basis of no cure no pay, came out of the bay to the assistance of the sinking vessel. By lashing themselves one on each side of her, they succeeded in keeping her up for two hours until they had beached her in Getares Bay, where the holes were temporarily patched by the divers carried by the salving steamers, and by means of their powerful pumping-gear the water in the vessel was lessened until she floated, when she was towed to Gibraltar. The whole operations lasted three days, with the result that, by the admission of the defendant owners of ship, freight, and cargo, this property, of the agreed value, as salved, of 76,596*l.*, was saved from certain total loss:—

Held, by the Court of Appeal (A. L. Smith, Chitty, and Collins L.JJ.), affirming the decision of Gorell Barnes J., and on the principles laid down by Lord Stowell in *The William Beckford*, (1801) 3 C. Rob. 355, and of Sir Charles Butt in *The Envoy*, (1888) (not reported), that it was to the general interests of navigation that the Court should by liberal rewards encourage the maintenance of powerful and efficient steamships kept in constant readiness to assist vessels in distress, and that, considering this special element, and the condition in which the salved vessel was at the time, together with the value of the salved and salving property, the skill displayed by the salvors, and the serious risk to their lives and property, the owners, masters, and crews of the two steamers were entitled, in equal moieties, to an award of 19,000*l.*

Appeal by defendants, the owners of the steamship *Glengyle*, her cargo and freight, against a decree of Gorell Barnes J. in an action of salvage, awarding the sum of 19,000*l.* to the plaintiffs, the Neptune Salvage Company, Limited, of Stockholm, owners of the *Hermes*, and the Nordischer Bergungsverein

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of Hamburg, owners of the *Newa*, and the masters and crews of those two steam-vessels. (1)

The material facts were shortly as follows :—

On August 26, 1897, about 2.30 A.M., a collision occurred in the Straits of Gibraltar, between the screw steamers the *Coronet* and the *Glengyle*, the latter being a vessel of 3455 tons gross register, on a voyage from London to China and Japan, manned by a crew of fifty-six hands, with passengers and cargo. The *Glengyle* sustained such serious damage that her passengers and crew got into boats, or on board the *Coronet*, which was also damaged.

About 3 A.M., in response to signals from the signal station indicating that there was a vessel in distress to the westward, the *Hermes* and *Newa*, which were lying at anchor in Gibraltar Bay with their steam up, at once proceeded to sea, and found the *Glengyle*, several miles away to the S.W., with her engine-room full of water, her fires drowned out, large quantities of water in her holds, and no one on board her. She was gradually settling down.

The *Hermes* is a screw steamer of 394 tons register, fitted with engines of 750 horse-power indicated, with a pumping capacity of 2750 tons per hour, and a crew of twenty-three hands. Her value is 22,000*l*. The *Newa* is a screw steamer of 459 tons register, fitted with engines working up to 750 horse-power indicated, with a pumping capacity of 5000 tons per hour, and a crew of twenty-one hands. Her value is 20,000*l*. Both these steamers are specially built for, and solely employed in, rendering salvage services, and are equipped with divers and diving apparatus, and powerful engines and pumps, and other salving appliances.

On the way to the *Glengyle* the *Hermes* fell in with a boat containing the master and some of her officers and crew, and

(1) The defendants also appealed against the award of 500*l*. in a consolidated action tried by Gorell Barnes J. at the same time, in which the plaintiffs, H. M. Bland & Co., Limited, owners of the steam-tugs *Hercules* and *Nellie* and their masters and crews claimed salvage for services rendered to the *Glengyle*, her cargo and freight; but these services are sufficiently referred to in the course of the other case, and the amount (500*l*.) awarded was not seriously contested.

the master, from the boat, requested that his vessel should be towed to Gibraltar, if she would keep afloat long enough. The *Hermes* and *Newa* made fast, the former ahead and the latter lashed to the starboard side of the *Glengyle*. As it appeared improbable that the *Glengyle* could reach Gibraltar, it was arranged to steer for Getares Bay, the nearest shore with a sandy bottom, where the *Glengyle* could be beached. The sheering of the *Glengyle* caused the *Hermes* to break adrift twice, and in order that no time should be lost, and as one salving steamer could not save the *Glengyle*, the *Hermes* was made fast along the port side, and in this manner the towage continued, with the assistance of the steam-tugs *Hercules* and *Nellie*, which came up about this time. The *Glengyle* was beached in Getares Bay at 6 A.M. on the 26th, her engine-room and stokehole being then full of water, and Nos. 3 and 4 holds having 15 feet of water in them. After she was beached the holes in her side were patched by divers, and the pumping gear of the salving steamers was set to work. By 10.30 P.M. the *Glengyle* was floated, and on the 27th was taken to Gibraltar Bay, where further work was done by the divers to the damaged plates. The pumping was continued till the 28th, when the *Glengyle* was able to keep the water down with her donkey-pump.

The 10th, 11th, and 12th paragraphs of the statement of claim, the allegations in which were admitted by the defendants, were as follows :—

"10. By means of the said services the *Glengyle*, her cargo and freight were rescued from certain total loss. When picked up by the *Hermes* and *Newa* she had been abandoned by her master, passengers, and crew, who were in great fear of their vessel immediately sinking. Although several vessels passed the *Glengyle*, they were all unwilling to attempt to render assistance, and none of them offered to do so, nor could any passing vessels, owing to their deep draught and want of power, have brought the *Glengyle* into a place of safety; and it was only owing to the prompt and skilful assistance of the *Hermes* and *Newa* that the *Glengyle* was, or could have been,

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saved from sinking in deep water, and being, with her cargo, totally lost."

"11. After the *Glengyle* was beached, the great pumping power of the said salvage steamers, and their divers and appliances, were of the utmost importance, both in enabling the *Glengyle* to be quickly floated and in saving her cargo and machinery from exposure to sea damage and risk of total loss, whilst lying submerged upon the open beach. The said salvage steamers are kept at Gibraltar with steam up day and night, with a full crew and divers, and complete salvage appliances on board, at very great expense, for the sole purpose of rendering salvage services to life and property on the basis of no cure no pay alone, and although frequently unemployed for long periods, extending sometimes to twelve months, are always ready to proceed to sea at the shortest possible notice. Their masters are specially selected for their skill and experience in salvage operations and local knowledge, and speak several European languages."

"12. In rendering the said services the *Hermes* and *Newa*, and the lives of those on board, were exposed to grave danger. If the *Glengyle* had sunk in deep water the said vessels, which were lashed alongside, would either have gone down with her or been seriously damaged. There was also great difficulty in keeping the *Glengyle* on a proper course, owing to her defective steering power, which caused danger of collision, and of the vessels going ashore on the Pearl Rock, or on Carners Point."

The value of the *Glengyle*, her cargo and freight, as salved, was agreed at 76,596*l*.

1897. Nov. 27. *Raikes, Q.C.*, and *Dawson Miller*, for the plaintiffs, the owners, masters, and crews of the *Hermes* and *Newa*. (1)

Aspinall, Q.C., and *Butler Aspinall*, for the defendants, the owners of the *Glengyle*, her cargo and freight.

(1) *Dawson Miller* also appeared separately for the owners, masters, and crews of the *Hercules* and *Nellie*.

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The arguments of counsel sufficiently appear from the following extract from the judgment of

Dec. 6. GORELL BARNES J. The Court is now asked by the owners, masters, and crews of the *Hermes* and *Newa* to award to them salvage remuneration for the services they have rendered. All the allegations in the statement of claim are admitted, except that alleging abandonment; and upon that point, from what took place before me at the hearing, I conclude that, although the master, crew, and passengers were compelled to leave the ship for their safety, it was not intended to abandon her if assistance could be obtained.

In salvage cases it is not uncommon for the defendants to admit the facts alleged by the plaintiffs, but not the inferences sought to be drawn therefrom. In this case facts and inferences are both admitted, and it is not suggested that the plaintiffs' statements are exaggerated.

It will be seen from the admissions made in this case that it presents to a remarkable extent most of the elements which affect the judgment of the Court in estimating the amount of a salvage award. The *Glengyle*, her cargo and freight, were rescued from certain total loss, and were of the very large value above stated. It was only owing to the prompt and skilful assistance of the *Hermes* and *Newa* that the *Glengyle* was, or could have been, saved. There were no other vessels which could have rendered this assistance; and I may add that if the *Hermes* and *Newa* had not had steam up, and been thus enabled to proceed to the *Glengyle* at once, the Elder Brethren consider that she would in all probability have sunk before they reached her. The values of the *Hermes* and *Newa* were large, namely, 22,000*l.* and 20,000*l.* respectively, and these vessels and the lives of those on board were exposed to grave danger. The salvors, therefore, might have sustained serious loss, and if they had not succeeded in saving the *Glengyle* they would have been without any right of compensation. The time occupied in rendering the services was only about three days, but the skill displayed by the salvors was high, and the labour expended obviously severe.

There is the further important element in this case that the

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Hermes and the *Newa* have been built, and are maintained solely for the purpose of rendering salvage services as described in the 11th paragraph of the statement of claim above set forth. The two foreign companies above mentioned have had the enterprise to establish these two steamers at Gibraltar, and to keep them ready to render salvage services at a moment's notice. An immense traffic, principally British I believe, passes through the Straits of Gibraltar, and the general interests of navigation and commerce are protected by provision being made for the rendering of prompt and efficient assistance to lives and property in danger in that locality and the adjoining seas.

Lord Stowell said, in the *William Beckford* (1): "The principles upon which the Court of Admiralty proceeds, lead to a liberal remuneration in salvage cases; for they look not merely to the exact quantum of service performed in the case itself, but to the general interests of the navigation and commerce of the country, which are greatly protected by exertions of this nature." These principles have been emphasised in many cases by different judges of the Admiralty Court. The remarks of Sir Charles Butt in *The Envoy* (2), in a case of salvage services rendered by steam-tugs, are very appropriate to the present case. He said: "To my mind, one of the most important functions of this Court is to encourage the maintenance of powerful and efficient steam-tugs around our coasts, to be in constant readiness to assist vessels in distress. Not only in the course of the year is a large amount of property saved by these means, but a considerable sacrifice of life is prevented. Therefore, the principle we go upon is not that of a quantum meruit, but of giving such an award as will encourage people to keep vessels of adequate size and dimensions ready to go out."

The maintenance and establishment of salvage steamers such as the *Hermes* and the *Newa* are for the general benefit of owners and underwriters and others interested in seagoing vessels and their cargoes, and the crews and passengers of such vessels, and, guided by the principles above stated, the Admiralty

(1) 3 C. Rob. 355. (2) Not reported. See Kennedy on Salvage, p. 118.

Court will be liberal in its awards in respect of services rendered by salvage steamers, even though the awards may fall somewhat heavily on individual owners.

The owners of salvage steamers invest a large amount of capital in them, and maintain them and their crews, divers, and appliances at great expense, and have no remuneration to look forward to except that which may be earned by occasional salvage services.

It remains for me to notice the argument of the plaintiffs' counsel that his case for a liberal award was better even than those of salvors of derelicts—and although there is no fixed rule as to the proportion to be awarded in such cases, they have been awarded a moiety of the value of the salved property in some instances, and frequently as much as one-third—because in the present case the loss of the *Gengyle* was certain unless the plaintiffs had assisted her, whereas in most of the cases of derelicts the vessels, though abandoned, were still floating, and might continue to float, and the danger to them was only of probable loss, varying in degree of probability, but not of certain loss.

Probable loss no doubt represents a degree of danger to property less than certain loss; but the argument of counsel for the plaintiffs did not sufficiently take account of the fact that far less proportions than those above mentioned have been awarded in cases of derelicts when the value of the property salved was large. An illustration of this is the case of *The Amérique*. (1) The reason is that a small proportion of a large value may adequately remunerate salvors, whereas it may require a much larger proportion of a small value to do so.

The value salved is an element—an important element—in considering the amount to be awarded; but the Court must not be induced by it to award a sum which is out of proportion to the services of the salvors.

Having carefully considered the circumstances of this case, and the elements found to exist in it, and especially that the owners or underwriters of this very valuable property have been protected against the certain loss of their interests by

(1) (1874) L. R. 6 P. C. 468.

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services rendered at the risk of the lives and property of salvors in the peculiar position of the plaintiffs, I have come to the conclusion, with the assistance, on the nautical questions involved, of the Elder Brethren of the Trinity House who have sat with me, that the proper remuneration to award to the plaintiffs, the owners, masters, and crews of the *Hermes* and the *Newa*, is the sum of 19,000*l.*, and I pronounce accordingly. I was asked to apportion the sum which I should award to the *Hermes* and the *Newa*. The Court sees no reason for preferring the one to the other, and therefore I apportion the sum of 19,000*l.* in equal moieties.

Another claim is made against the salved property by the owners of the steam-tugs *Hercules* and *Nellie*, and their masters and crews. The services of these vessels are set out in a separate statement of claim. As we consider that the *Hermes* and the *Newa* were powerful enough to beach the *Glengyle* alone, we do not attach so much importance to the services disclosed in this statement prior to the time when the vessel was beached as to those rendered after that time, and I am of opinion that for these claimants 500*l.* is an adequate award.

1898. Feb. 15, 16. *Sir R. T. Reid, Q.C., Aspinall, Q.C.*, and *Butler Aspinall*, for the appellants, the owners of the *Glengyle*, her cargo and freight. Assuming that it is desirable to encourage the performance of salvage services of this nature, and admitting that the services were skilfully performed, at considerable risk to the lives and property of the salvors, still it is submitted that the sum awarded by the learned judge in the Court below, amounting to one-fourth of the total value of the property salved, constitutes a new departure, which not only cannot be supported by precedent, but is out of all proportion both to the values involved and the risks incurred. An examination of the cases shews larger values, greater risks, but smaller awards. In the present case the actual period of risk of the vessel sinking in deep water did not exceed twenty minutes, the whole of the operations only occupied three days, the weather never was bad, and after the vessel was beached other assistance could have been obtained from Gibraltar; so

that the first short period is the only one for which a high award should be given—the rest was rather in the nature of work and labour; but the award in the present case is the largest ever made with the exception of *The Thetis*. (1) In that case, arising out of the recovery of bullion lost on the Brazilian coast, the award of 29,000*l*. to the salvors proper, besides 25,800*l*. expenses allowed to those who were not salvors, was on a value of 157,349*l*., and the salvage operations lasted eighteen months in a bad climate, the labour was excessive, and lives were lost over it.

In *The Glenduror* (2), on a value of 46,000*l*., 2000*l*. was, on appeal, awarded in consideration of the great danger the salvors incurred, and of the saving of lives.

In *The Amérique* (3) the value of the salved property was 190,000*l*., and that of the salvors over 35,000*l*.; but the Privy Council reduced an award of 30,000*l*. to 18,000*l*., on the ground that undue weight had been given to the value of the property.

[A. L. SMITH L.J. The plaintiffs' vessels in the present case were kept ready for immediate service.]

There is no such principle laid down in the reported cases as that there are to be two scales of remuneration—one for ordinary steamers, and another for salvage steamers. If the present case decides that there are to be in future these two scales, it will be a new departure, and in practice tugs are not so liberally rewarded as steamers not specially built for the purpose, the object being to induce such vessels with valuable cargoes and perhaps mails to assist other vessels in distress, which, without adequate remuneration, they will not do. On this ground the awards in these cases have tended of late to increase in amount, but in the case of tugs the awards have not increased to the same extent. Again, admitting the principle that salvage steamers are to be encouraged, the award in this case, even from that point of view, is exaggerated beyond reasonable limits. In the case of *The Envoy* (4), referred to with approval in the judgment in the present case, the value was 16,000*l*., but the award

(1) (1834) 2 Knapp, 390.
(2) (1871) L. R. 3 P. C. 589.
(3) L. R. 6 P. C. 468.
(4) Not reported. See Kennedy on Salvage, p. 118.

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was only 400*l.* In *The William Beckford* (1), the other case cited, in which stress was laid on the risk to life, the award was 1300*l.* on a value of 17,604*l.* In *The Vanguard* (2), on a value of 121,172*l.*, the award to two tugs worth above 5000*l.* was 2570*l.* In *The Morocco* (3) four tugs rescued the salved vessel from sinking, and on a value of 100,000*l.*, 2000*l.* was awarded. In *The Lindfield* (4), on a value of 30,000*l.*, the four tugs engaged in salving being worth about 15,000*l.*, the Court reduced an award of 7500*l.* to 5000*l.* In *The Dictator* (5), which was a very special case, on a value of 179,200*l.*, the award was 7500*l.* In *The Scindia* (6), a case of derelict, where one of the salving steamers was worth 150,000*l.*, and a question of liability for deviation was involved, the Privy Council increased an award of 2000*l.* to 3000*l.*, but that was only one-tenth of 30,000*l.*, the value of the salved property. See this case specially considered in *The True Blue.* (7) This Court will not hesitate to reduce a salvage award if the amount appears to be unjust to the owners of the salved property: *The Accomac* (8); and it is submitted that in order to induce salvage steamers to render services of this sort it is not necessary to reach so large a sum as 19,000*l.*

Raikes, Q.C., and *Dawson Miller*, for the respondents, the plaintiff salvors. This judgment has been characterised as a new departure; but it is the first time that the Court has had to consider the question of adequately remunerating the owners of specially built steamers with steam up day and night, equipped with powerful engines, pumps, diving apparatus, and every modern appliance for rendering salvage services with promptitude, on the terms of no cure no pay. It is only by a chance of this sort that the salvors can hope to recoup themselves for the heavy cost entailed upon them in the shape of the capital involved and daily expenses. The facts relating to the salved vessel also indicate services by the

(1) 3 C. Rob. 355.

(2) (1866) Pritchard's Ad. Dig. p. 1942.

(3) (1871) Pritchard's Ad. Dig. p. 1949.

(4) (1894) Not reported.

(5) Reported on another ground, [1892] P. 64, at p. 65.

(6) (1866) L. R. 1 P. C. 241.

(7) (1866) L. R. 1 P. C. 250, at p. 257.

(8) [1891] P. 349.

salvors of a special and highly meritorious character, for the salved vessel must have sunk in deep water if the salvors had not come to her assistance immediately, and for a time the lives of the large crews which these steamers carry, and the valuable property of the salvors, were in imminent danger of being lost, for, if they had failed to keep her afloat whilst lashed alongside, the two steamers might have been dragged down with her. Then there was the beaching of the salved vessel, which was a second operation of no little difficulty and danger; and thirdly came the important service of patching the holes in the plates of the vessel by means of the divers ready on board and pumping the water out, after which the vessel was successfully floated and towed to Gibraltar. There were no other vessels at hand which could have rendered these services, part of which were services only capable of being rendered by reason of these vessels being of the character of floating dock-yards, and all of these services were necessary in order to save the property. The awards in cases of derelict are always large, and have often amounted to one-half the value, or even more where the value was small; but these salvors are deserving of higher remuneration because they admittedly saved the vessel from certain total loss, whereas in cases of derelict the loss is only probable.

The case of *The Thetis* (1) is not in point, as, where one of Her Majesty's ships is the salvor, no claim can be made in respect of any loss, damage, or risk caused to the ship in rendering the service, and therefore the award of 29,000*l.* is no test of the proper amount for successful services conducted by private enterprise. So in *The Glenduror* (2) the facts necessitated making the award almost entirely in favour of the personal services of the salvors; but here one very material element is the great cost of the vessels themselves and of their special equipment. In *The Amérique* (3) the property of the salvor was exposed to little or no risk, as, if the salved vessel had gone down, she would not have taken the salving vessel with her. The case of *The Envoy* (4) contains the principle relied upon;

(1) 2 Knapp, 390.
(2) L. R. 3 P. C. 589.
(3) L. R. 6 P. C. 468.
(4) Kennedy on Salvage, p. 118.

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but the values in the present case are much larger and the facts much stronger, so that the amount of the award is no guide. So the principle laid down in *The William Beckford* (1) supports the view taken in the Court below, but was decided before the days of powerful steamers performing salvage services.

The other cases cited by the appellants have no real bearing, as they do not involve the two main ingredients present here, namely, the certainty of the total loss of the salved vessel but for the timely arrival of the salving vessels, and, secondly, that the vessel would not have been saved but for the power and special equipments of the salving vessels. For example, in the case of *The Morocco* (2) there was danger of the salved vessel sinking; but it was in the Mersey, where other assistance was on the spot.

A Court of Appeal will not interfere with an award unless the judge in the Court below has not appreciated some fact or has gone wrong on some principle; but this is a considered judgment, and the appellants have admitted that they cannot point out any error in respect of fact or principle. The question is whether sufficient inducement is to be held out to owners to establish this class of vessels round our coasts and in localities where, but for their timely services, life and property will inevitably be sacrificed.

Aspinall, Q.C., in reply. The question must be regarded from a commercial, not a philanthropic standpoint.

[The cases of *The Newnham* (3), *The Lochmaree* (4) and *The City of Chester* (5) were also referred to.]

A. L. SMITH L.J. During the argument of this case my mind has fluctuated a good deal, but the result at which I and my brother members of the Court have arrived is that this award, though large, must stand.

I will proceed to give the reasons why I come to that conclusion. It was stated boldly by counsel for the respondents

(1) 3 C. Rob. 355.
(2) Pritchard's Ad. Dig. p. 1949.
(3) (1881) Pritchard's Ad. Dig. p. 1937. Value of salved vessel 33,444*l.*, award 3300*l.*
(4) (1894) Not reported.
(5) (1884) 9 P. D. 182.

that this award is too little, but with that I certainly do not agree. It is admitted that there never has been a case before the courts in which the salving vessels were vessels made for salvage purposes alone, kept ever ready for those purposes alone, and useless for any other purpose whatever.

The action is brought by two foreign companies, one of them being the owners of the *Hermes* and the other being the owners of the *Newa*. These vessels are steam vessels of considerable size and strength—vessels made and fitted out entirely for salvage purposes. One of them is worth 20,000*l*., the other 22,000*l*.; and it was proved that these vessels are kept at Gibraltar solely and exclusively for the purpose of rendering salvage services at large expense to the proprietors, with fires always banked and a considerable number of men on board. They have apparatus and other matters important for salving purposes, and they are on the watch to rescue vessels when any information is given of their being in distress. A large expense is incurred by those two companies in keeping these salvage vessels at the mouth of the Mediterranean, where, as is found in the case, a large amount of property passes. It is only out of payment for salvage services that these vessels are maintained.

These vessels being thus kept for this purpose, what happened was this. On August 26 last the *Glengyle* was run into by another ship. News was sent to the salvors in the early morning of the 26th, and they went to this vessel. They came up to her in a very short time from starting. They started at 3 A.M., and came up to the *Glengyle* at 4.10 A.M.; the sea was smooth, there was no wind, and everything was in favour of the salving ships. But the ship was in such a moribund condition that there is no possible doubt that in a very short time, if both vessels had not come alongside and did what they did, she would have gone to the bottom, and the ship and cargo would have become a total loss. The value of the ship and cargo was 76,596*l*.

These two salving vessels made fast, one of them being shackled on to the starboard side of the *Glengyle*, a vessel of 3455 tons gross register, and the other towing ahead, but it

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became evident that the vessel was sinking fast, and making water to such an extent that the *Hermes* had to shackle on to the port bow of the *Glengyle* in order to keep the vessel afloat. In these operations the salving vessels not only incurred great risk, but the men on the salving vessels also incurred considerable risk to life; for if the *Glengyle* had heeled over under the circumstances in which she was taken in hand by the *Hermes* on the one side and the *Newa* on the other, it is not a certainty, but a great probability, that disaster would have happened, not only by the *Glengyle* going to the bottom, but that the salving vessels, and the crews on board them, would be lost. Our assessors, in answer to the questions put to them, have told us what I have already just stated, which was, I understand, the view of Gorell Barnes J. and of the Trinity Brethren who assisted him.

We have, therefore, not only imminent danger of the certain loss of the *Glengyle* and her cargo, but danger and possible loss to the salving vessels and their crews. The salving vessels were not able to tow the *Glengyle* as they had intended into Gibraltar because of her sinking state. It appears that at one time she suddenly settled down more than she had before, and what they then did was to run her ashore at 6 A.M. Therefore this part of the service began at 4.10 A.M. and ended at 6 A.M.

I agree with counsel for the appellants that at that time the greater salvage service came to an end; but that was not an end of the services rendered, because these two salving ships went on rendering services during the 27th and 28th. They got the ship at last into Gibraltar, having previously patched her and pumped her out.

Now comes the question—What is the amount the plaintiffs are entitled to recover? If this had been an ordinary salvage case, either by tugs or by a passing ship, for myself I think that the run of the authorities shew that this sum of 19,000*l.* would be excessive. Counsel for the appellants have referred to a large body of cases, in only one of which—*The Thetis* (1)—so large an amount has been given. But there is this material difference in this case, namely, that these two large salving

(1) 2 Knapp, 390.

vessels are kept at a very high expense for the purpose of salving ships; and one cannot shut one's eyes to this fact, that unless those ships had been kept where they were ready to proceed at once to sea, the owners of the *Glengyle* and of her cargo would have lost 76,596*l*. Taking that into consideration as one factor in the case, as also the risks which the salving vessels and their crews ran, I cannot say that the sum of 19,000*l*. which has been awarded by my brother Gorell Barnes is so excessive that this Court ought to set it aside. I am aware of the cases as to setting aside awards made by the judge of the Admiralty Court; but in the case which was most pressed upon us by the appellants' counsel, it was found that the learned judge had laid too much stress upon the value of the property salved. (1) That is undoubtedly an important factor, but I do not see that the learned judge laid too much stress on it in this case. In the cases there was not what I may call the special factor in this case to be dealt with. In my judgment it is of the highest importance to foster the maintenance of salvage vessels around our coasts and in localities such as in the case here, and I cannot say that this award, large though it is, is exorbitant under the circumstances. I have, therefore, come to the conclusion that the award must be upheld.

CHITTY L.J. I agree, and have very little to add. The question is not whether each one of us sitting here would have found exactly the same figure at which Gorell Barnes J. arrived, in awarding one-fourth of the value of the property saved. The question is whether in the exercise of our jurisdiction, sitting here on appeal, we are satisfied that the sum is in excess, and largely in excess, of that which ought to have been awarded.

Now, Gorell Barnes J. is a judge of great experience in Admiralty matters, and it appeared to me to be no light thing to depart from the opinion he has expressed in this case, because when his judgment is examined—it is a written and considered judgment—it will be found that there is no particular point upon which counsel for the appellants, in their excellent

(1) *The Amérique*, L. R. 6 P. C. 468.

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Chitty L.J.

arguments, could lay a finger as shewing that he had not taken into consideration all the elements which are appropriate to be considered in a case of this kind. I do not mean to say for that reason we could not, in the exercise of our jurisdiction as a Court of Appeal, overrule him: that has been done in more than one case. But it is said that there is a new departure in this case. I do not think there is any new departure, but there is a remarkable feature in the case. There were two foreign companies, maintaining at very considerable expense these two powerful vessels for the purpose of salvage. They are not like ordinary tugs, which along the coast are ready to pick up a vessel and tow her, and even to extend their towing to vessels in distress. These vessels were specially fitted for salvage purposes. Their total value was 42,000*l.*, and the crew of one numbered twenty-three, and of the other twenty-one. They were fitted with special pumping apparatus, and were kept in constant readiness to start. The observation of Lord Stowell, quoted by Gorell Barnes J., is one of very high importance, and applies with peculiar force to this case—namely, that when awarding remuneration in salvage cases, the Court does not "look merely to the exact quantum of service performed in the service itself, but to the general interests of the commerce of the country which are protected by exertions of this nature."

I think it is of the highest importance to encourage merchants and others to keep and establish in such a port as Gibraltar vessels of this class. Not only were the vessels of considerable value, as I have mentioned, not only had they large crews, but they also had divers, and the crews were specially skilled in the performance of salvage services of this kind. That makes, not the new departure, to my mind, relied upon, but an element justly taken into consideration, and to which I think Gorell Barnes J. has not attributed too much importance.

I agree that the *Glengyle* was not in a legal sense abandoned, but her master had removed the passengers and crew in the fear that the vessel was about to sink, and undoubtedly this vessel, the total value of which was over 76,000*l.*, was in a sinking state.

I do not think it necessary to pass under review the other

circumstances which are carefully dealt with by Gorell Barnes J., including the question which always arises in these cases, as to the proportion of the award in reference to the value salved. For the reasons I have stated, I think that this Court cannot say the award is in excess of the merits, and consequently the judgment must stand.

COLLINS L.J. I agree, and have nothing to add.

Appeal dismissed.

Solicitors for the appellants (defendants), the owners of the *Glengyle*, her cargo and freight: *Hollams, Sons, Coward & Hawksley.*

Solicitors for the respondents (plaintiffs), the owners, masters, and crews of the *Hermes* and *Newa*, and of the *Hercules* and *Nellie*: *William A. Crump & Son.*

T. L. M.

Distinguished. In re St. Peter St. Helier, Morden [1951] P. 303

1897
Aug. 20, 23;
Dec. 7.

[IN THE CONSISTORY COURT OF LONDON.]

In re ST. MARK'S, MARYLEBONE ROAD.

THE VICAR OF ST. MARK'S, MARYLEBONE ROAD, AND JOHNSON, LEY AND OTHERS INTERVENING *v.* THE PARISHIONERS OF ST. MARK'S, MARYLEBONE ROAD, BISHOP AND OTHERS INTERVENING.

Ecclesiastical Law—Faculty—Refusal of Confirmatory Faculty—"Stations of the Cross"—Crucifixes—Communion Rails—Tables of Ten Commandments, Lord's Prayer, and Apostles' Creed—Chancel Platform—Darkening of Windows in Chancel—Lamps Reflecting Light on Communion Table—Faculty—Communion Table—Reredos—Second Communion Table in Side Chapel.

The incumbent of a parish church having without a faculty, and contrary to the vote of the vestry and the wishes of the parishioners, introduced into the church pictures representing the "Stations of the Cross" proved to have been used superstitiously and four crucifixes, placed curtains over the Ten Commandments, the Lord's Prayer, and the Apostles' Creed engraved on the east chancel wall, and darkened the chancel by affixing permanent blinds on the east window and a side chancel window, the Court ordered that within three months the "Stations of the Cross," the crucifixes, and the curtains should be removed out of the church by the incumbent, and the outside blinds over the above-mentioned windows taken down by him.

If the incumbent should not comply with the order of the Court within three months of its date, the Court would be prepared to issue a faculty to the parishioners' churchwarden to carry out the order.

The erection in the chancel of a Communion Table with a reredos in substitution for the Communion Table formerly there, though made by the incumbent in opposition to a vote of the vestry, was sanctioned by a confirmatory faculty from the Court, on the ground of its being an artistic improvement to the church, subject to the platform on which the Communion Table stood being extended round the north end of the Table so as to enable the minister to officiate during the Communion Service standing at the north end.

The Court also sanctioned by confirmatory faculty the erection in the church of a side chapel with a Communion Table in it, though objected to by the parishioners, subject to the chapel being separated from the church on a plan to be approved of by the Court.

Sieveking v. *Kingsford*, (1866) 36 L. J. (Ecc.) 1, followed.

THERE were two causes of faculty promoted, one by Thomas Bishop, one of the churchwardens of the parish of St. Mark's,

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Marylebone Road, in the diocese of London, and T. W. Scarfe, and five other parishioners of the same parish, and the other by the Reverend Morris Fuller, vicar of the parish, and William Henry Johnston, the other churchwarden of the parish; the petition in the first of the two suits, dated June 5 last, alleging that the vicar had introduced into St. Mark's Church, without the sanction of a faculty, certain specified alterations and additions, and praying the Court to decree a faculty to restore the church to the state in which it was before the introduction of such alterations and additions, and the petition in the other suit, brought in on July 2 last, praying that a confirmatory faculty should issue authorizing the petitioners in that suit to retain in the church the alterations and additions in such last petition mentioned. (1)

The alterations and additions which one set of petitioners sought to have removed from the church, and the other set to have retained there, were, so far as material to this report, identical, and are fully described in the judgment of the Court.

A citation without intimation, directed to Bishop in special, and the parishioners of St. Mark's, Marylebone Road, in general, was issued on July 10, 1897, and on July 22, 1897, a responsive plea was brought in, signed by Bishop, by five of the six parishioners who had signed the above-mentioned petition of June 5, 1897, and four other persons, praying that the Court would not grant the confirmatory faculty prayed for as above stated for the alterations and additions introduced by the vicar. (2)

On the same 22nd of July the Court granted leave, subject to all just exceptions which might be taken at the hearing for an instrument of approval of and assent to the several matters alleged in the petition, to be filed on the part of Henry Ley, of 17, Struthwich Road, Hyde Park, and forty other persons,

(1) A caveat against the issue of any faculty, &c., had been entered on behalf of the vicar of St. Mark's, Marylebone Road, on April 13, 1897, and, in consequence of this petition having been filed, was warned on June 8, 1897.

(2) No citation was issued at the suit of Bishop or the six parishioners who had signed the petition of June 5, 1897, and no further proceedings beyond the filing of the petition were had in that suit.

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who were described as members of the congregation regularly attending service at St. Mark's Church, Marylebone Road, and had intervened in support of the prayer of the vicar's petition. (1)

1897. Aug. 20, 23. On these days, after further pleadings had been entered into, the cause promoted by the vicar and W. H. Johnston was heard before the Chancellor of the Diocese of London (Dr. Tristram, Q.C.).

Shearman-Turner appeared for the petitioners.

Bishop appeared in person to oppose the grant of any confirmatory faculty.

Witnesses in support of the pleadings were examined orally in court.

Their evidence, so far as material, is stated in the judgment.

Cur. adv. vult.

Dec. 7. DR. TRISTRAM. On June 5, 1897, Mr. Thomas Bishop, the people's churchwarden of the parish of St. Mark's, Marylebone, and six other parishioners, filed a petition in this court alleging that the Rev. Thomas Fuller, B.D., vicar of the parish, had made the following alterations in their parish church without a faculty, namely, the taking down and removal of the Communion rails from the chancel; the erection of a side chapel with a retable on the same in defiance of a warning sent to him by the Archdeacon of Middlesex; the erection of "Stations of the Cross" and using the same; covering portions of the east chancel walls with curtains so as to hide the Ten Commandments, the Apostles' Creed, and the Lord's Prayer engraven thereon; the removal of two gas standards from the chancel, permanently covering the stained glass window at the east end of the chancel, also a side window in the chancel with outside blinds, thereby obstructing the lights in the church; placing a large crucifix over the pulpit,

(1) See *Nickalls* v. *Briscoe*, [1892] P. 271, n. (1) (note as to the case of *Peek* v. *Trower*, (1881) 7 P. D. 21, where similar proceedings were taken).

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and in opposition to a resolution of the vestry removing the Holy Table belonging to the church and erecting another in its place with a reredos, in the centre of which on a box was placed a brass crucifix; and they prayed the Court to decree a faculty requiring the vicar to restore the church to its former state, and to condemn him in the expenses and costs incidental to the faculty.

Before a citation at the suit of the petitioners had issued, the vicar and his churchwardens filed a counter-petition praying the Court to decree a faculty confirmatory of many of these alterations, and for convenience the suits were consolidated and a citation issued on the vicar's and his churchwardens' petition, calling upon Mr. Bishop and the parishioners to shew cause why a confirmatory faculty should not be granted. This was followed by further pleadings; and the case was heard on August 20 and 23 last, when I reserved judgment, until I should have had an opportunity of inspecting the church, which I did in November. It appeared by the evidence that the attendance of parishioners at the Sunday services—which formerly averaged from 200 to 250—now averaged four or five only, and that the rest of the congregation was composed of non-parishioners. The reasons assigned to Mr. Bishop by the parishioners for having ceased to attend their parish church are the introduction of the new ritual, and of the ornaments objected to in the present suit.

The introduction of the "Stations of the Cross" and of crucifixes into the church are the additions which have given the greatest offence to the parishioners.

The question of the legality of introducing "Stations of the Cross" into an English church came under the consideration of Lord Penzance in the Court of Arches in *Clifton* v. *Ridsdale*. (1) In that case his Lordship made an order (from which there was no appeal) for their removal on two grounds: firstly, that they had been set up in St. Peter's Church, Folkestone, without a faculty; and, secondly, that it had been clearly established by two authoritative devotional books of the Roman Catholic Church that these representations are to

(1) (1876) 1 P. D. 316, 359.

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the present day authorized objects of adoration in that Church, and yet Mr. Ridsdale put them up in a church of the Church of England, and asked the Court to say that they were architectural decorations only, and of a lawful character. His Lordship added: "I think they are neither. Some of them, if they stood alone, ... may be unobjectionable in themselves, ... but the entire set, viewed as a whole, and in relation to their well-known history, must be regarded, I think, as likely (if not intended) to be used for the purposes for which they always have been used, and not for the mere purpose of decorating the church."

In the case now before the Court it was suggested for the vicar, that they were placed against the north and south walls of the church merely for decorative purposes. But it was established in evidence, that they were used in special services on Wednesday evenings in Lent for superstitious purposes. Mr. Scarfe, who had attended the church for twenty-seven years, in his evidence said: "I have witnessed the services at the 'Stations of the Cross.' On last Ash Wednesday evening I was present at this service. On entering the church a book was handed to me, and to the majority of the congregation, containing the whole service of the 'Stations of the Cross,'—the same as the one put in evidence in court. A procession was formed by an acolyte bearing the crucifix, and two acolytes with lighted candles, and the choir-boys holding this book, and several little girls, and three grown-up persons. The two acolytes held, as they went round to the Stations, the candles, one on each side of each picture, all the rest kneeling down before it, and by their attitude they appeared to me to be in superstitious adoration to the picture. After saying a few prayers before each picture, and singing a few lines, they proceeded to another picture and did the same thing. The curate, Mr. H. Ley, led them. There were from twenty to thirty persons there, besides those who formed the procession. I heard the prayer to the Virgin Mary—to be found at p. 98 of the book—read by the curate when before the Station containing a representation of the Virgin Mary. It is as follows: 'O Mary, blessed mother of my God, thou bearest in thine arms thine only Son, now

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dead, who often rested His Head asleep on thy breast. Pray for us, that as thou holdest Him lifeless in death, He may bear us up in the hour of our death in His everlasting Arms.' I also heard the boys give the response, 'Hail Mary,' after the reading of the prayer at p. 89 of the book.

"This book is a third edition, revised and enlarged, and is entitled 'Catholic Prayers for Church of England People,' and is bound up with the Prayer Book. In the preface to the second edition the compiler says: 'In this there are many additions, most of which have been asked for, or suggested to him. They are nearly all in the Catholic direction, and from Catholic books. There is in our midst such a plethora of Protestant piety that he felt enlargement in this little book must be on these lines. It is not for a moment maintained that all the prayers are in accordance with the Book of Common Prayer: by the very terms of their issue they are an addition to it.'" In his preface to the third edition, the one in evidence, the compiler says: "This edition has resulted in several little alterations, but the main matter is the same as before, the principal additions being, the Vespers for the Dead, and of our Blessed Lady, and the prayer of the Pope for the Unity of Christendom."

Mr. Scarfe's evidence of these "Stations of the Cross" having been used superstitiously was confirmed by that of Mr. Bishop. In *Clifton* v. *Ridsdale* (1) there was no evidence of the "Stations of the Cross" placed in that church ever having been superstitiously used; but Lord Penzance nevertheless ordered their removal on the ground that, if they were not intended, they were likely, to be so used. In the present case, there being clear evidence of their having been so used, it is imperative on the Court to make an order for their removal.

As to the crucifixes, on inspecting the church I observed that four had been placed there—one on a box in the centre of the chancel reredos, another on the wall above and immediately behind the pulpit, another on the north wall of the church, and a fourth on the reredos in the side chapel. There is no judicial decision binding on this Court to the effect that a crucifix may be set up or placed in a church as a lawful church ornament.

(1) 1 P. D. 316.

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The figure of our Saviour on the Cross, as forming the central figure of the historical representation of the momentous scene of the crucifixion of our Lord, was held by the Judicial Committee of Her Majesty's Privy Council in the *Exeter Reredos Case* (*Phillpotts* v. *Boyd*) (1) to be lawful as a church decoration.

The following passage as to the use of crosses as architectural decorations in churches occurs in the judgment of the Lords of the Judicial Committee of the Privy Council in the case of *Westerton* v. *Liddell* (2) :—

"Upon the whole, their Lordships, after the most anxious consideration, have come to the conclusion that crosses, as distinguished from crucifixes, have been in use, as ornaments of Churches, from the earliest periods of Christianity; that when used as mere emblems of the Christian faith, and not as objects of superstitious reverence, they may still lawfully be erected as architectural decorations of Churches; that the wooden cross erected on the Chancel screen of St. Barnabas is to be considered as a mere architectural ornament; and that, as to this article, they must advise Her Majesty to reverse the judgment complained of. Their Lordships hope and believe that the laws in force respecting the consecration of any building for a Church, and which forbid any subsequent alteration without a faculty from the Ordinary, will be sufficient to prevent any abuse in this respect."

For the purpose of the order which the Court is about to make in respect of the crucifixes placed by the vicar in this church, it is sufficient to observe that crucifixes at the time of the Reformation were enjoined to be removed from all churches as tending to superstition; that their introduction as ornaments into our churches has not the sanction of the rubrics or of the canons of the Church; that their exclusion from our churches as ornaments has been ratified by the practice of nearly three centuries and a half; that the people's churchwarden and the parishioners of this parish, who are members of the Church of England, conscientiously object to their being retained in their church, and assign their introduction as a reason for their

(1) (1875) L. R. 6 P. C. 435.
(2) (1857) Special Report by Moore, at p. 175.

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refusal to attend divine service. I take it that an ecclesiastical judge, in the exercise of the discretionary power entrusted to him in relation to allowing or disallowing unprescribed ornaments in a church, should have regard to the fact that in our national Church there always have been and always will be large numbers of its members whose views on church ornaments, as well as on questions of doctrine within certain limits, are not in harmony, and that he should make such orders in reference to the introduction of unprescribed ornaments into a parish church as will not be likely to give just cause of offence to any of the parishioners, to whatever party in the Church they may belong. As the attendance of parishioners at the Sunday services in this church has fallen from 200 and 250 to five in number, the Court in the exercise of its discretion will make an order for the removal of all crucifixes from the church.

There are three minor alterations which have been made by the vicar to which the parishioners with reason object: (1.) The covering with curtains of the Ten Commandments, the Lord's Prayer, and the Apostles' Creed, which are engraved on the east wall of the chancel on either side of the Holy Table. These curtains should be removed. (2.) The removal of two gas standards, which had been fixed in the chancel floor for the purpose of assisting to light the body of the church. They should be replaced in their former or in some equally convenient site for better lighting the body of the church. (3.) The placing of permanently fixed blinds over the east window, and over a side window in the chancel. These blinds should be removed.

There remain for the consideration of the Court two other alterations made by the vicar in the church without the sanction of a faculty. (1.) The removal of the Communion rails and of the Holy Table into the vestry, and the substitution of a new movable Holy Table made of wood with a handsome reredos above it. This last alteration was made by the vicar within a week of the vestry having passed an unanimous resolution in disapproval of the change.

On inspecting the church Mr. Bishop directed my attention to a box in the centre of the reredos, which he stated when first erected was constructed to open on hinges, and his impression

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was that it had been so constructed with a view to placing in it the Reserved Sacrament; but at that time the hinges had been removed, and it was closed. He also directed my attention to the platform, on which the officiating minister stands when officiating at the Communion Service, not having been extended round the north end of the Holy Table, so as to preclude a minister from officiating there. My attention had been previously directed by the Archbishop of Canterbury, when Bishop of London, to this omission in the restoration of some chancels in the diocese, and to the importance of seeing that it was rectified, so as to give every minister the option of officiating at the north end of the Holy Table. The removal of the Communion rails and the Holy Table, and the substitution of a new one without a faculty, was done in contravention of ecclesiastical law. But on inspecting the church I came to the conclusion that the new Holy Table and reredos were artistically an improvement to the chancel, and the old Communion rails were not in harmony with them, and that, subject to the box on reredos remaining closed, and the platform being extended round the north end of the Holy Table, there was no reasonable objection to their remaining. In 1866, in the case of *Sieveking and Evans* v. *Kingsford* (1), a case very similar to the present one, Dr. Lushington, in the Arches, allowed by a confirmatory faculty a Holy Table, which had been introduced by the clergyman of the parish into the chancel in opposition to a vote of the vestry, to remain as an improvement to the church, which is a precedent for my doing so in this case. The Court will include in a confirmatory faculty its sanction to the retention of the new Holy Table and reredos, subject to the platform being extended round the north end of the Holy Table.

(2.) The erection of the side chapel with a Holy Table in it in the north aisle of the church by the vicar without a faculty, notwithstanding his being warned by the Archdeacon of Middlesex that in so doing he was violating the law, was also objected to by Mr. Bishop. It has been the practice in this diocese for some time past for this Court to grant faculties for

(1) 36 L. J. (Ecc.) 1.

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the erection of a side chapel in a church with a Holy Table in it for the celebration of early Communion to small congregations, when the Court is satisfied on evidence, that it will be a convenience to the congregation and the minister, and a saving of expense, subject to the chapel being separated from the church by trellis-work or otherwise, so that it shall have the appearance of being a chapel, and not a side altar such as is usual in Roman Catholic churches. It appeared in evidence that it is of convenience, that there should be a side chapel with a Holy Table in it in this church. The Court will in a confirmatory faculty sanction the retention of the present side chapel with the Holy Table subject to the chapel being further separated from the church by trellis-work on a plan to be approved of by the Court.

An order will be made on the vicar to remove the "Stations of the Cross," the crucifixes, the outside blinds from the chancel windows, the curtains that cover the Ten Commandments, the Lord's Prayer, and the Apostles' Creed; directing him to make a return to the Court of what he has done in the matter within six weeks from this date; and a confirmatory faculty will issue to him in respect of the new Holy Table, reredos, and side chapel, subject to his making the alterations in them already mentioned. The vicar is condemned in all the costs incidental to the above orders.

If the vicar does not within three months from the date of this decree make the alterations directed by the Court, the Court will decree a faculty to issue to Mr. Bishop as churchwarden to give effect to the orders of the Court made in this case.

Solicitors for petitioners for confirmatory faculty: *Brooks, Jenkins & Co.*

C. F. J.

1898
Feb. 26.

WHITE *v.* WHITE (THE QUEEN'S PROCTOR SHEWING CAUSE).

Divorce—Practice—Costs—Pauper Petitioner—Intervention of Queen's Proctor.

A pauper petitioner, who is unsuccessful upon the intervention of the Queen's Proctor, is liable to be condemned in the full costs of the intervention.

APPEAL by the petitioner to the judge at chambers for an order that the taxation of the Queen's Proctor's bill of costs should be reviewed.

The petitioner, James White, who sued in formâ pauperis, filed a petition for the dissolution of his marriage with the respondent, Ada White, on the ground of her adultery. There was no defence, and the Court pronounced a decree nisi. The Queen's Proctor afterwards filed a plea charging the petitioner with adultery. The petitioner admitted the adultery, but denied that he committed it till after the respondent had left him, and prayed the Court in the exercise of its discretion to make the decree absolute. The Court, after hearing counsel on behalf of the Queen's Proctor and the petitioner in person, rescinded the decree nisi, dismissed the petition, and condemned the petitioner in costs.

Stevenson, for the petitioner. The Queen's Proctor cannot recover costs against a pauper petitioner, except where he charges collusion under s. 7 of the Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144). Costs are not recoverable against a pauper plaintiff in either the Queen's Bench or the Chancery Division. In any case the Queen's Proctor is entitled only to counsel's fees and the expenses of witnesses.

Willock, for the Queen's Proctor. The argument for the petitioner is based upon the judgment of the House of Lords in *Lautour* v. *Her Majesty's Proctor*. (1) But under s. 2 of the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), the Queen's

(1) (1864) 10 H. L. C. 685.

Proctor, intervening as one of the public, can recover costs. The question of pauper costs is exhaustively dealt with in *Richardson* v. *Richardson and Plowman* (1), where the President says in his judgment: "I understand that the practice hitherto followed has not excluded successful respondents and co-respondents from obtaining an order for their full costs, for what it is worth." If this is so, it is submitted that the Queen's Proctor is entitled to an order for his full costs.

It was afterwards stated that the Queen's Proctor did not in this case press for an order.

SIR F. H. JEUNE, PRESIDENT. I adhere to all that I said on the subject of pauper costs in *Richardson* v. *Richardson and Plowman*. (1) The costs of the intervention of the Queen's Proctor in the case of a pauper petitioner are entirely in the discretion of the judge, and an unsuccessful pauper petitioner is therefore liable to an order condemning him in the full costs of the intervention. In this case I understand that such an order is not insisted on, and the order for costs may therefore be rescinded.

Solicitor: *The Solicitor to the Treasury.*

(1) [1895] P. 276, at p. 280.

H. D. W.

1898
March 28.

In the Goods of STEVENS.

Probate—Grant of Administration—Misconduct of Widow—Grant to Son of Intestate.

Where the widow of an intestate, whose estate was small, was shewn to have been a woman of dissipated habits, who had eloped with another man sixteen years before the application, and had not since been heard of, the Court made a grant of administration to the only son of the intestate, without the citation of the widow.

Application on behalf of William Alfred Stevens, the only son of John Stevens of Eccles near Aylesford, in the county of Kent, foreman bricklayer, for a grant of administration of the personal estate of his father, who had died intestate, without citing Louisa Stevens, his mother.

The deceased left freehold property of the value of about 300*l.* subject to a mortgage of 150*l.* and money in Post Office Savings Bank and other personal effects of the value of 55*l.*

The applicant, a sailmaker at Eccles, deposed that the marriage had taken place in 1862, and that his mother, who was a woman of drunken habits, had eloped with another man in 1882, since which date she had not been heard of, and that he believed that she was dead.

These statements were confirmed by affidavits by the sister and the niece of the deceased.

Lipscomb, in support of the application, referred to *In the Goods of Anderson* (1) and *In re Boddan.* (2)

[Sir F. H. Jeune, President. In the latter case an effort seems to have been made to discover the person entitled to administration.]

The personal estate is very small, and it would really be idle to cite the widow of the intestate.

Sir F. H. Jeune, President. It is most important that persons who are entitled to administration should not be passed over, without having an opportunity of asserting their rights.

(1) (1864) 3 Sw. & Tr. 489. (2) (1873) 28 L. T. (N.S.) 368.

1898

STEVENS, IN THE GOODS OF.

The President.

On the whole, however, having regard to the peculiar circumstances of this case, and the time which has elapsed since the elopement, I think that I may, on the authority of *In the Goods of Anderson* (1), make a grant to the son of the deceased intestate, without the citation of his widow. Justifying security must be given to the extent of the value of her share in the personalty.

Solicitor: *C. Hamilton White.*

H. D. W.

THE WARSAW.

1898

March 4, 8.

Admiralty—Compulsory Pilotage—River Tyne—Tyne Pilotage Order Confirmation Act, 1865 (28 & 29 *Vict. c.* 44), *Sched., ss.* 16, 22—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 604, *sub-s.* 1.

A British steamship, belonging to the defendants, with passengers for Newcastle, from a place in the British Islands, came into collision with the plaintiff's vessel in the Tyne. Neither the master nor the mate of the defendants' steamship held a pilotage certificate for the Tyne district, within which the collision occurred, and the vessel was at the time in charge of a pilot duly licensed by the Tyne Pilotage Commissioners. The pilot was found alone to blame:—

Held, by Gorell Barnes J., that the defendants were not liable for the damage sustained by the plaintiff, as, under s. 604, sub-s. 1, of the Merchant Shipping Act, 1894, pilotage was compulsory, notwithstanding the provisions of s. 16 of the schedule to the Tyne Pilotage Order Confirmation Act, 1865, as interpreted in *The Johann Sverdrup*, (1886) 12 P. D. 43.

ACTION OF DAMAGE BY COLLISION. The plaintiff was the owner of the steam-tug *Warrior*. The defendants were the owners of the steamship *Warsaw*.

The case is reported on the question of pilotage being compulsory in the River Tyne.

On August 3, 1897, about 4 A.M., whilst the tug *Warrior* was lying moored alongside another steamer at the Felling Buoys in the River Tyne, she was run into and damaged by the *Warsaw*, a steamship of 354 tons register, belonging to the port of Leith, and on a voyage from Leith to Newcastle, with a general cargo and fifty-one passengers. The *Warsaw* was, at

(1) 3 Sw. & Tr. 489.

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the time, proceeding up the river in charge of a pilot duly licensed by the Tyne Pilotage Commissioners, and neither the master nor the mate of the *Warsaw* held a pilotage certificate for the Tyne district within which the collision occurred.

On March 4, 1898, the Court found that the collision was solely occasioned by the fault of the pilot in charge of the *Warsaw*, and the question of the pilotage being compulsory was then argued.

Aspinall, Q.C., and *Butler Aspinall*, for the plaintiff, the owner of the *Warrior*.

Boyd, Q.C., and *F. Laing*, for the defendants, the owners of the *Warsaw*.

The arguments of counsel fully appear from the judgment. The sections of the statutes bearing on the question are there set out, and the cases cited are all mentioned therein.

Cur. adv. vult.

March 8. GORELL BARNES J. I have already decided that the collision was solely occasioned by the fault of the pilot of the *Warsaw*, and the question now arises whether or not the employment of the pilot was compulsory by law.

This question depends upon statute law. The first sub-section of s. 604 of the Merchant Shipping Act, 1894, is as follows: "The master of every ship carrying passengers between any place in the British Islands, and any other place so situate, shall, while navigating within the limits of any district for which pilots are licensed under this or any other Act, employ a qualified pilot, unless he or the mate of his ship holds a pilotage certificate or a certificate granted under this section applying to the district, and, if he fails to do so, shall for each offence be liable to a fine not exceeding one hundred pounds." Subject to a contention raised by counsel for the plaintiff, this sub-section is applicable to the case, and determines the question in favour of the defendants, because the vessel was carrying passengers between places in the British Isles, and neither the master nor the mate had a pilotage certificate.

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Counsel for the plaintiff, however, contended that, notwithstanding this section, the vessel was exempted from compulsory pilotage by virtue of s. 16 of the order, confirmed by the Tyne Pilotage Order Confirmation Act, 1865. That section is in the following terms: "Nothing in this order shall extend to oblige the owner or master of any vessel to employ or make use of any pilot in piloting or conducting such vessel into or out of the said district or within any part thereof, if he is not desirous so to do, or to pay any pilotage dues when not employing or making use of a pilot." Sect. 22 of the same order provides that "Nothing in this order shall exempt the commissioners or the pilotage district aforesaid from the provisions of any general Act of Parliament, now in force or hereafter to be passed, relating to pilotage, or pilotage dues, or to merchant shipping . . . ."

I am of opinion that in the absence of any previous decision binding the Court to decide otherwise, s. 604 of the Act of 1894 expressly imposed upon the master of the *Warsaw* the duty to employ a qualified pilot, and that the order and Act of 1865 do not free him from this duty. It was, however, urged for the plaintiff that the present case is governed by the decision in *The Johann Sverdrup*. (1) In that case a collision occurred in the Tyne between a British vessel and the Norwegian steamship *Johann Sverdrup*, owing to the negligence of the pilot in charge of the latter. The owners of the foreign vessel were held liable on the ground that the employment of the pilot was not compulsory. She was not carrying passengers. Although it is stated in the judgments of the learned judges who decided that case, both in the Divisional Court and in the Court of Appeal, that the effect of s. 16 of the order is to abolish compulsory pilotage in the Tyne, they were not dealing with the case of a vessel carrying passengers between ports in the British Islands. The question was as to the effect of the Act of 1865 upon a previous Act regulating pilotage in the Tyne. That was an Act passed in 1801, which compelled foreign vessels coming into or leaving the Tyne to employ pilots licensed by the Trinity House of Newcastle-upon-Tyne. The Act of 1865

(1) 12 P. D. 43.

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transferred the old jurisdiction of that Trinity House to the Tyne Pilotage Commissioners, by whom the pilot in charge of the *Johann Sverdrup* was licensed. It was held that the Act of 1865 superseded the pilotage provisions of the Act of 1801, and that no obligation to employ a pilot was imposed by s. 16 upon any vessel, whether British or foreign. It will be seen that no question was raised or considered as to the effect of s. 354 of the Merchant Shipping Act, 1854, for which s. 604 of the Act of 1894 is now substituted.

The order of 1865 was made under the powers conferred by the Merchant Shipping Act Amendment Act, 1862, s. 39—replaced by certain sections of the Act of 1894—and confirmed by the Act of 1865, and although it superseded the local Act of 1801, and substituted new regulations for those contained in that Act, there is nothing in it inconsistent with s. 354 of the Act of 1854, or s. 604 of the Act of 1894. Sect. 16 of the order does not even expressly exempt vessels from employing pilots. It merely provides that nothing in the order shall extend to oblige the owner or master of any vessel to employ a pilot or pay pilotage dues, and it is followed by s. 22, which I have referred to above.

The case of *The Temora* (1) was cited by counsel for the defendants. That case decided that s. 354 of the Merchant Shipping Act, 1854, is not restricted by the provisions of s. 353, "That all existing exemptions from compulsory pilotage should continue in force." These sections are now replaced by ss. 603 and 604 of the Act of 1894, and by s. 746 any local Act which repeals or affects any provisions of the Acts repealed by the Act of 1894 is to have the same effect on the corresponding provisions of that Act as it had on the said provisions repealed by that Act.

The case of *The Temora* (1) was not decided on the exact point now in dispute, and although it is favourable to the defendants, it is not necessary to rely on it, because I am of opinion, for the reasons given above, that s. 604 expressly makes pilotage compulsory upon vessels circumstanced as the *Warsaw* was; and that the Act of 1865 does not prevent its

(1) (1860) Lush. 17.

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application. Therefore, although the plaintiff has unfortunately suffered loss through the collision in question, as the collision was solely occasioned by the fault of the pilot, and there was no fault on the part of the defendants or their servants, the defendants are not responsible for the loss, and my judgment must be in their favour, with costs.

Solicitors for plaintiff, the owner of the *Warrior*: *Coote & Ball, for Adamson & Adamson, North Shields.*

Solicitors for defendants, the owners of the *Warsaw*: *Stokes & Stokes, for Lietch, Dodd, Bramwell & Bell, Newcastle-on-Tyne.*

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[DIVISIONAL COURT.]

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Admiralty—Charterparty—Construction—Bill of Lading—Freight—Cost of Discharge.

By a clause in a charterparty it was agreed that freight on a cargo of coals shipped by the defendants on the plaintiffs' steamship from Sunderland to Port de Bouc should be paid "at the rate of 9*s.* per ton of 20 cwts. . . . . delivered, or on bill of lading quantity, less 2 per cent., at receiver's option, to be declared in writing before bulk is broken"; and by another clause the consignees were "to effect the discharge of the cargo, steamer paying 1 fr. per ton of 20 cwts." The bill of lading stated that the quantity of coal shipped was 1184 tons. On arrival at Port de Bouc the consignees exercised their option by accepting the cargo at the bill of lading quantity, less 2 per cent., but charged the ship with 1 fr. per ton on the bill of lading quantity without deducting the 2 per cent.:—

Held, by the Divisional Court (Sir F. H. Jeune P. and Gorell Barnes J.), affirming the decision of the county court judge, that the clauses of the charterparty must be read together, and, as the consignees had elected to pay freight on the bill of lading quantity, less 2 per cent., the same deduction of 2 per cent. must be allowed by the defendants in respect of the payment of 1 fr. per ton by the shipowner for the discharge.

APPEAL by defendants, in an action for balance of freight for carriage of goods by the steamship *Hollinside*, against a decision of the judge of the Newcastle County Court in favour of the plaintiffs.

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The question turned on the construction of a charterparty dated September 14, 1897, in the form of the Chamber of Shipping North-East Coast (Tees to Berwick) Coal Charter, 1896. It was made between the plaintiffs, the Charlton Steam Shipping Company, Limited, owners of the steamship *Hollinside*, and the defendants, Worms & Co., of Newcastle-on-Tyne, as agents for the charterers. By clause 1 it was agreed that the *Hollinside* should proceed to South Dock, Sunderland, and there load a cargo of Lambton gas coal, not exceeding 1250, nor less than 1000 tons, and proceed therewith to Port de Bouc and deliver her cargo as ordered, "on being paid freight at the rate of 9*s*. per ton of 20 cwts., or 1015 kilos. delivered, or on bill of lading quantity, less 2 per cent., at receiver's option, to be declared in writing before bulk is broken. If the receiver should elect to weigh the cargo at the port of destination, the weighing shall be done (by an official weigher) at his expense. The owner may provide a check-weigher at steamer's expense. Should any deficiency be alleged on the authority of such weighing, it shall affect the freight only, from which no deduction shall be made for alleged shortage of cargo, any custom of the port of discharge notwithstanding, but the owner shall furnish, if required, a statutory declaration by the master and other officers that all the cargo received on board has been delivered . . . ." By clause 6, "The bills of lading shall be in the form indorsed on this charter, and shall be signed by the master, agent, or owner, weight unknown, freight and all conditions as per this charter." By clause 8, "The cargo to be taken from alongside by consignees at port of discharge, free of expense and risk to the steamer. . . . Consignee to effect the discharge of the cargo, steamer paying 1 fr. per ton of 20 cwts. or 1015 kilos. . . ."

The bill of lading dated September 24 stated that 1184 tons of gas coals had been shipped "weight unknown."

On arrival at Port de Bouc the consignees, for the purposes of the payment of freight, exercised their option under clause 1 of the charterparty by accepting the cargo at the bill of lading quantity of 1184 tons, less 2 per cent., in lieu of weighing, but, under clause 8, they charged the ship 1 fr. per ton on the bill

of lading quantity, without deducting the 2 per cent., making a difference of 18*s.* 10*d.*, which sum the plaintiffs sought to recover as wrongfully deducted from the freight, and the defendants counter-claimed for the same amount.

At the trial, on January 14, 1898, at the Newcastle County Court, the learned county court judge held that evidence, tendered by the defendants, as to the actual weight of the cargo carried and discharged, was irrelevant, and entered judgment for the plaintiffs for the amount claimed, dismissed the counter-claim, but gave leave to appeal.

Joseph Walton, *Q.C.*, and *F. Laing*, for the appellants (defendants). Upon the true construction of the charterparty the decision in the Court below was erroneous, and the defendants were entitled to judgment. The provision in clause 1, as to the calculation of freight by a deduction of 2 per cent. from the bill of lading quantity, is an arrangement between shipper and charterer fixing a conventional quantity to save time and expense, and exclusively relates to freight. It cannot, therefore, be read into clause 8, which deals with the payment to be made by the steamer to the consignee for discharging the cargo. Under the latter clause the charge of 1 fr. per ton is necessarily on the actual weight of the cargo carried and discharged, and, under their counter-claim, the defendants were entitled to give evidence of this actual weight. For the purpose of ascertaining this weight the defendants could adopt the bill of lading weight, which is primâ facie evidence until displaced by evidence of the actual quantity: *McLean* v. *Fleming*. (1)

Boyd, *Q.C.*, and *D. Stephens*, for the respondents (plaintiffs). Clauses 1 and 8 of the charterparty are correlative, and when the consignee availed himself of the option given him under clause 1, and for payment of freight accepted the bill of lading weight less 2 per cent., the same quantity then became applicable under clause 8 in respect of the payment for discharge. The bill of lading contains the words "weight unknown," and thereby the quantity stated therein is not even primâ facie evidence against the shipowner: *Jessel* v. *Bath*. (2) See also

(1) (1871) L. R. 2 H. L., Sc. 128. (2) (1867) L. R. 2 Ex. 267.

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Carver on Carriage of Goods by Sea, 2nd ed. § 71. By exercising the option the consignee prevented the shipowner ascertaining the actual weight. If clause 8 is construed so as to give the defendants the right to charge 1 fr. per ton on the quantity shipped, then the appellants would, on the discharge, be overpaid in every case in which they elected to pay freight according to the bill of lading weight, because there is of necessity waste in shipping and discharging, and the 2 per cent. fixed by agreement is a fair average allowance for that waste as ascertained by experience.

Joseph Walton, Q.C., in reply. The form of charterparty is in general use in the North Country coal trade, and cannot well be altered.

[GORELL BARNES J. Why not? There is a side-note against the clause as to the payment of 1 fr. in these words: "Owners to have the option of striking out the last sentence in clause 8 if so agreed with the charterers."]

The club insurances are all effected on the basis of the charterparty as it stands.

THE PRESIDENT (SIR F. H. JEUNE). We have to put a construction upon the meaning of the 1st and the 8th clauses of this charterparty.

It appears that the cargo of coals was not weighed at the port of destination, because the receivers did not exercise their option to do so; and then the question arises, On what weight is the expense of the receiving to be charged? Is it to be charged upon some figure which at present seems not to have been ascertained, unless the bill of lading is to be taken to be sufficient evidence of it, or is it to be taken upon the actual amount of the bill of lading less 2 per cent.? That is to say, is the expense of the discharge to be treated in the same way as the freight? That depends upon the construction to be put upon those two clauses. The 1st undoubtedly, in terms, refers to the freight, and to freight alone. What it provides is, that "on being paid freight at the rate of 9*s.* per ton of 20 cwts. or 1015 kilos., delivered, or on bill of lading quantity, less 2 per cent., at receiver's option, to be declared in writing before bulk

is broken.. If the receiver should elect to weigh the cargo at the port of destination, the weighing shall be done (by an official weigher) at his expense. The owner may provide a check-weigher at steamer's expense." I think there is nothing in the subsequent part of the clause which affects the matter. Now we come to clause 8: "The cargo to be taken from alongside by consignees at port of discharge, free of expense and risk to the steamer, at the average rate of 300 tons per day," and so on; and then, "Consignee to effect the discharge of the cargo, steamer paying 1 fr. per ton of 20 cwts. or 1015 kilos., and providing only steam, steam-winches, winchmen, gins and falls." That, in terms, relates only to the cost of discharge, and the question is whether those two clauses are to be read together.

If the convenience of the matter is considered, I should have thought it clear that it was intended that the question would be governed by the weighing in one case, or the refusal to elect to weigh in the other. Counsel for the appellants, however, contend that there are reasons why, under the 8th clause, the actual weight, and not the conventional weight, should be taken; but it appears to me that these reasons are entirely outweighed by the consideration of the practical difficulties which arise. It seems to me to place the shipowner at a disadvantage which it was not intended he should be under. If the receiver elects to weigh, then there is a provision by which the mode of weighing is to be carried out, which binds both parties. But if he does not elect to weigh, then the shipowner will be left under clause 8, either, I suppose, to take the bill of lading weight, or he would be left to weigh in the best way he could, and in a manner which would not be necessarily binding on either side.

It is said that the bill of lading is primâ facie evidence, and that, therefore, all you have to do is to take the evidence afforded by the bill of lading, and that it is for the shipowner to displace it. Considering that the bill of lading quantity never, I should think, would be the correct quantity, indeed the provision that 2 per cent. is to be deducted shews that some deduction is necessary; and having regard to the great practical

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difficulty of weighing, unless it is done by an official weigher, it seems to me most probable that it was intended that clause 8 should be read with clause 1.

I do not think it necessary to decide whether the bill of lading in this case, having regard to its form, would be primâ facie evidence of the amount delivered, and I am not sure whether it would be primâ facie evidence even of the amount received; but assuming it to be primâ facie evidence, that does not carry the matter very far, because such primâ facie evidence would be displaced by evidence shewing that in point of fact the amount on the bill of lading could not correctly represent the amount delivered.

Under these circumstances I am prepared to hold that the convenience is so clearly on the side of reading the two clauses together, that they ought to be so read, and I am fortified in that opinion by observing that clause 8 is obviously imperfectly drawn. It states only the sum to be paid—"1 fr. per ton"—and does not say whether it is to be per ton delivered or per ton received, or per ton of bill of lading, or per ton of bill of lading with deduction. It appears to me to be clear that that clause cannot be read by itself. The whole of the charterparty must be looked at, and, looking at the whole, you find provisions which, although I agree they are not applicable in terms, yet may so well be read together, that it seems only common sense that they should be read together. I therefore think the learned county court judge was right.

GORELL BARNES J. This action is brought for a small balance of freight—18*s.* 10*d.*—and there is a counter-claim which seeks to extinguish that claim on the ground that this balance of freight is absorbed by the cost incurred by the consignees for discharging the cargo. The dispute arises out of the terms of the charterparty, which is described as the known form adopted for the North Country coal trade, and settled by agreement. It strikes me as singular that it should be settled so as to leave one of the matters which must have been almost of daily or weekly occurrence in such a state as to give rise to this question. Counsel for the appellants further say

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that the charterparty cannot be altered, and that the point must be decided in this case. I do not agree with that view, because it seems to me that power is given so that, if necessary, the parties can alter it.

The question turns upon the meaning of certain words in the 1st and 8th clauses. Now the scope of this charterparty is to provide for the delivery at the port of discharge to the consignees of a coal cargo, freight being paid either upon the amount actually delivered, or upon an estimate of that quantity arrived at by taking the bill of lading weight, and reducing that by an agreed amount of 2 per cent. The consignee has the option of adopting either of those two courses, and the decision rests with him. He may weigh or not, as he chooses. If he chooses to weigh, there is a mode provided for doing it; if not, then he may pay freight on the bill of lading quantity, less an estimated deduction in weight of 2 per cent. In this case the latter course was adopted.

The difficulty which arises is upon the language of the latter part of the 8th clause, which says that the discharge of the cargo is to be paid for at 1 fr. per ton of 20 cwts., without saying how that 20 cwt. is to be arrived at. The appellants say that it is to be arrived at by the actual weight; the respondents' contention is that it is to be arrived at in the same way as the freight was arrived at. I think the charterparty must be read as a whole, so as to make it work from a business point of view. Reading it in that way, it seems to me that the respondents' contention is right. If it is not right, then the difficulty will always arise that, after the receiver has exercised his option as to freight, and taken the bill of lading weight, he will make his charge for the discharge on the actual weight. Then the question would be raised, What is the actual weight? Everybody concerned in discharging the cargo would, if the parties chose to fight it out to the bitter end, have to be called to give evidence to prove that weight. Can that have been the intention of those who drew up this charter? I do not think it is a reasonable meaning to give the document, and therefore I think, taking the charterparty as a whole, the meaning is that the option carries with it, on the one hand, the weight actually

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delivered, if freight is paid on the actual delivered weight, and, on the other hand, a payment on the weight ascertained by the bill of lading, less 2 per cent., if that is the way in which the consignees choose to pay freight and thus to exercise their option. I see no injustice in so reading this charterparty, because the object of reducing the bill of lading weight by 2 per cent. is to account for the waste which is found by experience to take place in the coal. That seems to me to be the true meaning of the document; and, therefore, this appeal fails.

Appeal dismissed. Leave to appeal refused.

Solicitors for appellants (defendants): *Ince, Colt & Ince.*

Solicitors for respondents (plaintiffs): *Stokes & Stokes, for Lietch, Dodd, Bramwell & Bell, Newcastle-upon-Tyne.*

T. L. M.

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Dec. 6.

KETTLEWELL *v.* KETTLEWELL. (1)

Divorce—Permanent Maintenance—Large Income—Settled Property that of Husband alone—Test of what would have been an adequate Jointure—Clause "dum sola et casta."

A wife obtained a divorce from her husband on the ground of his adultery and cruelty. The income of the husband had been 19,000*l.* a year, and the wife, who had herself brought nothing into settlement, had 1400*l.* a year under her marriage settlement.

The Court, on the petition of the wife for permanent maintenance, considering that 3000*l.* a year would have been an adequate jointure for the widow of a man in the husband's position, granted her 1600*l.* a year in addition to her present allowance, the additional 1600*l.* a year to be payable "dum sola et casta vixerit."

Sykes v. *Sykes*, [1897] P. 306, and *Wood* v. *Wood*, [1891] P. 272, followed.

APPLICATION for permanent maintenance by Edith Kettlewell, the petitioner in the suit, whose marriage with Charles Thomas Kettlewell, the respondent, had been dissolved, on the ground of his adultery and cruelty.

(1) The petitioner appealed. The case came on for hearing in the Court of Appeal on March 25, 1898, when it was stated that the appeal had been withdrawn, the parties having come to terms.

The registrar reported that it had been agreed between the parties that the respondent's income was 19,000*l.* a year, that he had settled 25,000*l.* on the petitioner, who had herself brought nothing into settlement, and that her income at present amounted to 1400*l.* a year; and recommended that a further sum of 1600*l.* should be secured to her, either "dum sola et casta," or otherwise, as to the Court should seem fit.

There were no children of the marriage. It appeared that the petitioner had formerly been divorced for adultery with the respondent.

Bargrave Deane, Q.C., and *Kisch*, for the petitioner. The allowance recommended is inadequate. The joint income is over 20,000*l.* a year, and 3000*l.* a year is little more than a seventh of this sum. It is submitted that 5000*l.* a year, a fourth of the joint income, should be allowed.

[SIR F. H. JEUNE, PRESIDENT, referred to the judgments of Chitty and Lord Ludlow L.JJ. in *Sykes* v. *Sykes* (1) in the Court of Appeal, in which the test of what would be an adequate jointure is suggested.]

The question there raised was as to alimony pendente lite. The old rule was to allow a fifth in that case, and a third in the case of permanent alimony. No doubt a third would here be too much, but it is important that the petitioner and respondent have really been spending this large joint income together. He has no pursuit, such as horse-racing, which a wife could not share.

[SIR F. H. JEUNE, PRESIDENT. The petitioner's expenses, when she lives apart from the respondent, will be fewer. She will not require a yacht, or shooting. Would not 3000*l.* a year be a sufficient provision for the wife of a man in the respondent's position if she were left a widow?]

It is submitted that 5000*l.* a year would be a more reasonable allowance. The respondent has not to provide for children, and he has paid alimony pendente lite at the rate of 2000*l.* a year. There should be no clause "dum sola et casta."

(1) [1897] P. 306.

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Marshall Hall, for the respondent. The allowance recommended is sufficient. The petitioner brought no money into settlement, and has been herself divorced. The dicta in *Sykes* v. *Sykes* (1) apply as much to permanent maintenance as to alimony pendente lite. That decision overrules *Fisher* v. *Fisher* (2), but affirms *Sidney* v. *Sidney* (3), in which the Court held that a wife who divorces her husband for misconduct is entitled to "a fair and reasonable share of the necessaries and comforts" to which she has been accustomed. Here, the wife was a poor woman before her second marriage.

The case is one in which a clause "dum sola et casta" should be inserted, in conformity with the directions given by the Court of Appeal in *Wood* v. *Wood*. (4) The petitioner will have 1400*l*. a year if she marries for a third time. Why should the respondent pay her third husband 1600*l*. a year in addition? She is also, though an injured, not a blameless wife.

Bargrave Deane, Q.C., in reply. The last topic does not become her seducer. It is submitted, as a matter of principle, that the Court is not entitled to take into consideration the conduct of the parties outside their married life. If the clause is used, the petitioner will be liable to annoyance from spies. The practice of the Court is, it is submitted, against the insertion of the clause at this stage.

SIR F. H. JEUNE, PRESIDENT. In this case there are two questions to be considered, the amount to be secured by the husband to the wife upon the dissolution of the marriage, and whether a clause "dum sola et casta" should be inserted in the order.

The husband's income is 19,000*l*. a year. The wife, who herself brought nothing into settlement, has 1400*l*. a year under her marriage settlement. The registrar recommends that this income should be increased to 3000*l*. a year.

It is not practicable to fix any amount as absolutely right. The ordinary rule is to give a fifth of the joint income as alimony pendente lite, and a third as permanent maintenance; but no one would suggest a third in this case. It would clearly

(1) [1897] P. 306.
(2) (1861) 2 Sw. & Tr. 410.
(3) (1865) 34 L. J. (P. M. & A.) 122.
(4) [1891] P. 272.

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be too much. What then is to be the test? I think that a good one has been suggested in the judgments delivered in the Court of Appeal in *Sykes* v. *Sykes*. (1) The question before the Lords Justices was no doubt different from that which is raised here, but I think that their observations are a useful guide. Lord Ludlow says: "Test it in this way. Would not the proposed sum be considered, in the case of a settlement, to be an adequate jointure for a widow who had been in the position of the wife of a baronet like the husband in this case?" I also think that, where the conduct of the wife has been blameless, the allowance should be handsome, and such as would be made by a liberal man with such a position and income. Now here the husband has a large income, and has, I should gather, lived in a luxurious way. But there must be many expenses connected with such a joint household, which the wife, when living apart from her husband, will not incur; and it must be remembered that her position, during her unmarried life, and her life with her former husband, did not represent an expenditure of anything like 3000*l.* a year. There are also no children of the marriage. These are all matters to be taken into consideration. The registrar has given the case great attention, and I have had several similar cases before me. On the whole, I think that if a man in the position of the respondent had left his widow a jointure of 3000*l.* a year, he would have made what the world would call a handsome provision for her. I therefore confirm this part of the report.

The other question is whether there should be a clause "dum sola et casta." As regards this matter, I desire to follow to the fullest extent the judgment of the Court of Appeal in *Wood* v. *Wood* (2), which states emphatically that "each case ought to depend on its own circumstances," and enumerates the circumstances to be taken into consideration. Now, I think that in this case the amount which the wife will have in any event is most material. She will always have 1400*l.* a year. The question, therefore, is whether the additional 1600*l.* a year should be continued, if she should marry a third time.

When I decided *Wood* v. *Wood* (2) I was impressed with

(1) [1897] P. 306. (2) [1891] P. 272.

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what Sir James Hannen had said in *Gladstone* v. *Gladstone* (1) as to the reasonableness of making the allowance cease upon a second marriage, where all the money comes from the husband. But I think that this must be regarded as modified by what Lindley L.J. says in *Wood* v. *Wood* (2), though perhaps not more than to the extent that where the amount which has been settled is small, it may not be right to deprive the wife of it, and by Sir James Hannen's own decision in *Lander* v. *Lander* (3), where the wife was not innocent. In *Wood* v. *Wood* (2) Lindley L.J. says: "If, as in this case, the husband's means are such that he can only allow his wife a bare subsistence, and she has nothing, it seems to us unjust that this subsistence money should cease merely because she may marry again. The continuance of the allowance may conduce very materially to her marrying, and to her future comfort and happiness. On the other hand, justice to him does not in my opinion require the cessation of so small an allowance on her marrying again." But in this case the question is not one of a bare subsistence, but of a large addition to an already substantial income. 1400*l.* a year is a fair fortune for any woman to bring to a husband, and 3000*l.* a year a large one. I think, therefore, that, having regard to the earlier decisions, such as *Fisher* v. *Fisher* (4) and *Gladstone* v. *Gladstone* (1), which I regard as modified to the extent which I have mentioned by *Wood* v. *Wood* (2), and looking to the circumstances which that judgment directs me to consider, the condition "dum sola" should be inserted.

Ought the words "et casta" to be added? It has been usual to add them, no doubt for the reason that it would seem almost a parody of justice to suggest that a woman should lose her allowance if she marries again, but should not lose it if she lives with a man as his mistress. Where indeed the reputation of the wife is spotless, these words may be omitted. (5) Here the fact that the petitioner has been divorced has been brought to my knowledge, and I should, therefore, have been compelled,

(1) (1876) 1 P. D. 442.
(2) [1891] P. 272.
(3) [1891] P. 161.
(4) (1861) 2 Sw. & Tr. 410.
(5) See *Smith* v. *Smith*, [1898] P. 29.

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if necessary, to find that her reputation was not spotless. In this case my opinion is that, as there is to be a clause "dum sola," the words "et casta" should be added. I cannot agree with the learned counsel for the petitioner in his contention that the words "the conduct of the parties" in the judgment in *Wood* v. *Wood* (1) are intended to refer only to the conduct of the parties during the marriage. I do not consider myself bound to close my eyes to the fact that the petitioner has been divorced, whoever the man was with whom she committed adultery.

Solicitors: *Beyfus & Beyfus; Baker, Folder & Upperton.*

H. D. W.

IN THE GOODS OF WINSTONE.

1898

April 25.

Administration—Practice—Presumption of Death—Presumption of Death from Disappearance for Seven Years.

On an application, made in 1898, for leave to presume the death of a person who had not been heard of since 1891, of whose death no evidence was offered beyond the fact of his disappearance, and who had been cited in a suit which was pending in the Chancery Division, the Court, in giving leave to depose to the death, directed that the grant of administration should, except in so far as it might be required in the Chancery Division, remain in the registry till the expiration of seven years from the date of the disappearance.

APPLICATION for leave to swear the death of Richard Winstone.

The applicant, the wife of the alleged deceased, deposed that she had married him in 1884, and that they had lived at Leith. He was a fireman, and in 1890 left Leith on board a steamer for London and Cardiff. At the end of the year she heard from him from Genoa, and in 1891 she received letters from him from America, and one dated July 29 from a doctor stating that he was in a hospital at Fort Madison, Iowa, his foot having been amputated. Nothing had been heard of him since.

(1) [1891] P. 272.

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WINSTONE, IN THE GOODS OF.

Under the will of his father the alleged deceased was, subject to the life interest of his mother, entitled to a moiety of certain leasehold premises at Carton, Glamorganshire. On her death in 1896 a partition suit was instituted in the Chancery Division on behalf of his sister, her husband, and their infant children, the persons interested in the other moiety, and advertisements were published citing him to prove his claim, but they had produced no result. No answers had been received to inquiries sent to the hospital at Fort Madison. He was believed not to have made a will.

The application was supported by affidavits by his sister and the solicitor who was conducting the proceedings in the Chancery Division.

Priestley, in support of the application.

[GORELL BARNES J. The only evidence of the death is the length of time since the disappearance.]

In the recent case of *In the Goods of Matthews* (1) a similar application was granted three years after the disappearance. This Division has not followed the practice of the Chancery Division as to presumption of death from disappearance for seven years.

GORELL BARNES J. gave the applicant leave to swear that the death had occurred on or since July 29, 1891, but directed that the grant should, except in so far as it might be required in the Chancery Division, remain in the registry till the expiration of seven years from that date.

Solicitors: *Oldfield, Bartram & Oldfield.*

(1) Ante, p. 17.

H. D. W.

In the Goods of BARNETT.

1898
May 2.

Administration—Practice—Real Estate—Application by Heir-at-law—Land Transfer Act, 1897 (60 & 61 *Vict. c.* 65), *Part I., s.* 2, *sub-s.* 4.

By the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), Part I., s. 2, sub-s. 4, "Where a person dies possessed of real estate, the Court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next of kin, shall be equally entitled to the grant with the next of kin, and provision shall be made by rules of Court for adapting the procedure and practice in the grant of letters of administration to the case of real estate."

Per Gorell Barnes J.: Where the title of the person applying under the sub-section for administration as heir-at-law is clear, and there is no personalty, a grant may be made to the applicant without notice to the next of kin; but where the title of the applicant is doubtful, or the amount of the personalty large as compared with the realty, notice should be given to the next of kin.

Application for a grant of administration to the freehold estate of Abraham Barnett, of Sidney Street, Commercial Road, in the county of London, who died on January 10, 1898, intestate, and a bachelor without child or parent.

The applicant was Samuel Barnett, the eldest son of the eldest brother of the deceased, and, as alleged, his heir-at-law.

The real estate consisted of a freehold house in Russell Street, Mile End, a freehold house in Sidney Street, Commercial Road, and three copyhold houses in Thomas Street, Bucks Row, Whitechapel. The surviving brothers and the male issue of a deceased brother of the deceased had been admitted as tenants of the copyhold property, according to the custom of the manor, which was gavelkind. There was no personal property. These facts were proved by affidavit, but no certificates of marriage, birth, or death were exhibited, and it was stated that there would be difficulty in proving the marriage of Samuel Barnett, the father of the deceased, which had taken place in Poland, and the birth of his sons, the brothers of the deceased.

Priestley, in support of the application. The applicant is

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BARNETT, IN THE GOODS OF.

entitled to a grant of administration of the freehold estate, under s. 2, sub-s. 4, of Part I. of the Land Transfer Act, 1897. (1) The Act does not apply to copyhold land: Part I., s. 1, sub-s. 4. (1) There being no personalty, notice to the next of kin is not necessary.

GORELL BARNES J. In this case, subject to the filing of an affidavit stating that there was no issue by any former marriage of the intestate's father, who would be entitled to be heir-at-law in preference to the applicant, I think that a grant may be made to him in general terms without giving notice to the next of kin. But I desire to say that, where the title of the applicant is doubtful, or the amount of the personalty is large as compared with the realty, notice should be given to the next of kin.

Solicitors: *Jennings, Son & Allen.*

(1) By the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), Part I., s. 1, sub-s. 4, "The expression 'real estate' in this part of the Act shall not be deemed to include land of copyhold tenure, or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant."

By Part I., s. 2, sub-s. 4, "Where a person dies possessed of real estate, the Court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next of kin, shall be equally entitled to the grant with the next of kin, and provision shall be made by rules of Court for adapting the procedure and practice in the grant of letters of administration to the case of real estate."

H. D. W.

In the Goods of ARDERN.

1898
May 2.

Administration—Grant to Heir-at-Law of Intestate Wife, passing over Husband—Land Transfer Act, 1897 (60 & 61 *Vict. c.* 65), *Part I., s.* 2, *sub-s.* 4—*Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.

By the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), Part I., s. 2, sub-s. 4, "Where a person dies possessed of real estate, the Court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next of kin, shall be equally entitled to the grant with the next of kin, and provision shall be made by rules of Court for adapting the procedure and practice in the grant of letters of administration to the case of real estate."

A wife died intestate. Her husband survived her, and she left a son by a former marriage, a minor, who was her heir-at-law.

On it appearing that the husband was a dissipated man, who was mismanaging a public-house which was part of the estate, and of which he refused to give up possession, the Court, acting under the sub-section and s. 73 of the Court of Probate Act, 1857, granted administration of the estate to the guardian ad litem of the infant heir-at-law.

Application on behalf of the heir-at-law for the administration of the estate of Mary Ardern, late of the Devonshire Arms Hotel, Fairfield, Buxton, in Derbyshire, who died intestate on January 3, 1898. Her husband, James Ardern, survived her. Her heir-at-law was Edward Nadin, her only son by a previous marriage, a minor aged eighteen, who had elected Thomas Poyster of Sheffield to be his guardian ad litem.

The value of the personal estate was 400*l.*, that of the real estate, consisting of the hotel and six cottages at Fairfield, 2500*l.*

It was alleged in support of the application that James Ardern was a man of drunken habits, and was conducting the business in such a way as to imperil the licence and lessen the value of the property, and that he refused to give up possession unless he was given 100*l.*

Newton Crane, for the applicant. The application should succeed. Under the Land Transfer Act, 1897, Part I., s. 2,

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sub-s. 4 (1), the heir-at-law ranks with the husband, and ought to be preferred to him, as the latter is damaging the property.

[GORELL BARNES J. The statute says, "In granting administration the Court shall have regard to the rights and interests of persons interested in the real estate."]

Priestley, for the husband. There is no power to pass over the husband. Accidentally or intentionally the sub-section does not mention him. He is not "the next of kin." He is entitled to administration of his wife's estate "jure mariti."

GORELL BARNES J. This seems a clear case. Having regard to the special circumstances, administration of the estate may be granted, under sub-s. 4 of s. 2 of the 1st part of the Land Transfer Act, 1897, and s. 73 of the Court of Probate Act, 1857, to the guardian ad litem of the heir-at-law of Mary Ardern, for his use and benefit till he attains the age of twenty-one.

Solicitors: *Campion & Simmons, for Clegg & Sons, Sheffield; Cree & Son.*

(1) By the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), Part I., s. 2, sub-s. 4: "Where a person dies possessed of real estate, the Court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next of kin, shall be equally entitled to the grant with the next of kin, and provision shall be made by rules of Court for adapting the procedure and practice in the grant of letters of administration to the case of real estate."

H. D. W.

In the Goods of ROBERTS.

1898
April 5.

Administration with the Will annexed—Grant ad Colligendum—Necessity for Citation of Heir-at-Law—Land Transfer Act, 1897 (60 & 61 *Vict. c.* 65), *Part I., s.* 2, *sub-s.* 4.

By the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), Part I., s. 2, sub-s. 4, "Where a person dies possessed of real estate, the Court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next of kin, shall be equally entitled to the grant with the next of kin, and provision shall be made by rules of Court for adapting the procedure and practice in the grant of letters of administration to the case of real estate."

By an additional rule and order, dated November 20, 1897, for the registrars of the principal and district registries: "All rules orders and instructions and the existing practice of the Court with respect to non-contentious business shall, so far as the circumstances of each case will allow, be applicable to grants of probate and administration made under the authority of the Land Transfer Act, 1897."

A married woman who owned certain farms made a will, by which she left her real estate to her husband for life, with remainder to her natural daughter absolutely, and all her personal estate to her husband, whom she appointed executor.

Her natural daughter died in her lifetime. Her husband died without proving the will, and administration of his personal estate was granted to his sister as next of kin. It was not known who was the heir-at-law of the testatrix. The value of the real estate was 7688*l.*, that of the personal estate 45*l.*:—

Held, on an application by the administratrix of the husband, for a grant of administration of the real and personal estate of the testatrix, that, having regard to the provisions of the sub-section, the heir-at-law not having been cited, a general grant ought not to be made, but that the applicant might take a grant ad colligendum, which would enable her to let and manage the farms, till the heir-at-law could be cited.

Application for administration of the real and personal estate of Mary Anne Roberts, with her will and a codicil thereto annexed, by Mary Roberts, the sister and next of kin of the husband of the testatrix, Edward Roberts, who had obtained a grant for the administration of his personal estate.

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ROBERTS, IN THE GOODS OF.

The testatrix was tenant in fee simple, under the will of her uncle John Thomas who died on March 21, 1877, of certain farms in Montgomeryshire. By an indenture dated July 2, 1877, she conveyed this property to such uses as she and her husband should by deed jointly appoint, and in default of such appointment to such as she, notwithstanding coverture, should by deed or will appoint, and in default of such appointment to the use of her husband and herself for their respective joint natural lives, and subject thereto to the use of the survivor after the decease of the other, and in all cases without impeachment of waste, and subject thereto to her own use and that of her heirs and assigns for ever.

By her will of the same date the testatrix appointed that all and singular the messuages, farms, lands, and hereditaments comprised in and conveyed by this indenture should go, remain, and be to the use of her husband Edward Roberts for life, and subject thereto to the use of her natural daughter Mary Anne, her heirs and assigns for ever, and gave and bequeathed all her personalty to her husband, and appointed him executor of her will.

On September 26, 1877, the testatrix executed a codicil to her will by which she directed that, under her power of appointment, the estate to be taken by her husband in the freehold property should be for his natural life, in case he remained a widower, and without impeachment of waste.

Mary Anne Roberts, the natural daughter of the testatrix, died in her lifetime. The testatrix died on January 20, 1898. Her husband died on February 10, 1898, a widower, intestate, and without having taken out probate of his wife's will. Letters of administration had been granted to Mary Roberts, his sister and next of kin, the present applicant.

It was stated that Dorothy Jones, a minor, a daughter of Charles Edward Jones, a grandson of Robert Jones, a brother of the father of the testatrix, claimed to be her heiress-at-law, but that at present no sufficient evidence of her claim could be produced, and that it would be necessary to have recourse to the Chancery Division in order to ascertain who was heir or heiress at law, and to obtain directions as to

the letting and management of the farms, and that for this purpose the appointment of a personal representative was necessary.

The value of the real estate was 7688*l.*, that of the personal estate 45*l.*

Willock, in support of the application. The husband, who was executor of the will, but who died without obtaining probate, was the universal legatee of the personal estate. The applicant is his personal representative, and would, as such, but for the directions given in sub-s. 4 of s. 2 of Part I. of the Land Transfer Act, 1897 (1), be entitled to a general grant. She is, however, not the next of kin of the testatrix, and there is an intestacy as to the real estate, and the heir-at-law is unknown and cannot be cited.

[SIR F. H. JEUNE, PRESIDENT. Might not the heir-at-law be cited as a person unknown?]

The applicant is advised that proceedings in the Chancery Division will be necessary in order to discover the true heir-at-law. In the meantime it is necessary to let the farms. Might not a grant be made under s. 73 of the Court of Probate Act, 1857?

[SIR F. H. JEUNE, PRESIDENT. That section refers only to intestacy as to personal estate.]

SIR F. H. JEUNE, PRESIDENT. If the will dealt only with personal estate, the applicant would be entitled to a general grant. But the will deals also with real estate, and the statute

(1) By the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), Part I., s. 2, sub-s. 4, "Where a person dies possessed of real estate, the Court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next of kin, shall be equally entitled to the grant with the next of kin, and provision shall be made by rules of Court for adapting the procedure and practice in the grant of letters of administration to the case of real estate."

By an additional rule and order, dated November 20, 1897, for the registrars of the principal and district probate registries: "All rules orders and instructions and the existing practice of the Court with respect to non-contentious business shall, so far as the circumstances of each case will allow, be applicable to grants of probate and administration made under the authority of the Land Transfer Act, 1897."

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The President.

directs that where a person dies possessed of real estate, the heir-at-law shall be equally entitled to the grant with the next of kin. (1) The applicant is, however, not the next of kin of the testatrix, but the personal representative of her husband. The heir-at-law has consequently priority over her, and, until he has been cited, she is not entitled to a general grant. I think, however, that although heretofore grants ad colligendum have been applicable to personal estate only, they may, by virtue of the Land Transfer Act, 1897, and the rule made under it, be made applicable to real estate. The applicant may, therefore, take a grant ad colligendum with special mention of liberty to deal with the farms, till the heir-at-law can be cited.

The order was as follows: "It is ordered that letters of administration of the personal estate of the said deceased be granted to the said Mary Roberts, such grant to be limited ad colligendum, &c., but that the administratrix be at liberty to let the farms and other portions of the real estate, and to sell the farming stock and implements of husbandry belonging thereto."

Solicitors: *Patersons, Snow, Bloxam & Kinder.*

(1) Ante, p. 151, note (1).

H. D. W.

ROBINSON *v.* ROBINSON.

1898
May 3.

Divorce—Justices—Duty of Clerk to Justices—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *ss.* 4, 5, 11.

On an application by a married woman for an order for judicial separation, custody of children, or maintenance, under s. 5 of the Summary Jurisdiction (Married Women) Act, 1895, it is the duty of the clerk to the justices to make a note of the evidence and of the reasons for the decision, and supply the note, should there be an appeal, to the Probate Division.

Appeal of Elizabeth Robinson from a decision of the Court of Petty Sessions of Watford in Hertfordshire refusing her an order for judicial separation and maintenance under s. 5 of the Summary Jurisdiction (Married Women) Act, 1895, against her husband Henry Robinson, on the ground of persistent cruelty which had caused her to leave and live apart from him.

It having been stated that the clerk to the justices had refused to give the wife's solicitor a copy of the depositions, counsel agreed that a newspaper report of the trial might be used.

G. M. Cohen, for the wife.
Turrell, for the husband.

Sir F. H. Jeune, President. This case comes before us in an unsatisfactory manner, as we have not a note of the evidence and therefore cannot tell exactly what passed before the justices. Shortly after the Act passed, we stated that it was important that a note of the evidence should be made by the clerks to the justices, and, in every other case that I can remember, our request has been complied with, and we have received a note of the depositions on which we could rely. We have also always had a statement, often an excellent statement, of the reasons for the decision. It has no doubt given the clerks some trouble to prepare these notes, from which we have derived so much assistance; but it is to be remembered that the Act conferred a jurisdiction which was to some extent

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The President.

new, and is one involving matters of vital moment to the parties, and also that it gave an appeal to this Court as regards both law and fact. It is, therefore, essential that we should be informed as accurately as possible of the proceedings before the justices. In this case I am sorry to say that we have not the assistance of the depositions. We have been told that the evidence was taken down, but that the clerk to the justices has refused to supply the note; but I cannot believe that he could have so far departed from his plain duty. [The President then reviewed the evidence, and decided that the justices were wrong, and that the case must be sent back to be reheard.]

GORELL BARNES J. I agree. I desire to add that it is, in my opinion, essential that notes of the evidence, and of the reasons for the decisions of the justices, should be made at the time of the trial, because in all these cases an appeal lies to this Court, and it is impossible for this Court to do justice on the appeal unless it has a full and proper record of what has taken place in the Court below. If this record is not supplied, the parties may be put to great expense in trying to prove before us what really did take place before the justices, and, if they do not succeed in doing so, this Court may have to decide upon insufficient materials, and the result may be injustice.

Solicitors: *Camp & Ellis, Watford; Broad & Riggall, Watford.*

H. D. W.

[IN THE CONSISTORY COURT OF LLANDAFF.]

1897
Dec. 18.

THE VICAR AND CHURCHWARDENS OF ST. JOHN THE BAPTIST, CARDIFF *v.* THE PARISHIONERS OF THE SAME.

Ecclesiastical Law—Faculty—Footpath across Churchyard for Use of Parishioners and Public—Proviso for closing Footpath on one Day in the Year.

In a faculty granted for a fenced-in footpath across a closed parish churchyard for the use of the parishioners with right of way for the public, a proviso was inserted for the footpath to be closed on one day in the year in order to shew that it remained an integral portion of the churchyard with certain limitations on its use.

THIS was a cause of faculty instituted on behalf of the Rev. Charles James Thompson, vicar of the parish church of St. John the Baptist, Cardiff, Honorary Canon of the Cathedral of Llandaff, and Thomas Henry Stephens and Alfred Watkins Sargeaunt, both of Cardiff, the churchwardens of the said church of St. John the Baptist, for the purpose of obtaining a faculty for the construction of a footpath across the parish churchyard, as shewn on a plan annexed to the petition (1), and for all necessary and proper works in connection therewith, as provided and comprised in an agreement, also annexed to the petition, and made between the petitioners and the corporation of Cardiff.

1897. Dec. 14. The cause was now heard before the Chancellor of the Diocese of Llandaff (Joseph Earle Ollivant, Esq.). Witnesses in support of the petition were examined orally. The result of their evidence and the contents of the above-mentioned agreement material to this report can be gathered from the judgment.

B. Francis-Williams, Q.C., appeared for the petitioners.

No opponent appeared.

Cur. adv. vult.

(1) An affidavit verifying the contents of the petition in the cause, and sworn by one of the petitioners, was lodged in the registry at the same time as the petition.

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ST. JOHN THE BAPTIST, CARDIFF (VICAR OF) v. PARISHIONERS OF SAME.

Dec. 18. THE CHANCELLOR. This is an application by the vicar and churchwardens of the parish church of St. John the Baptist, Cardiff, for a footway across the churchyard, together with an easement of right of way over it, for the public, to meet the desire of the corporation of Cardiff, with whom the petitioners had entered into an agreement, subject to a faculty, the petitioners alleging that "it would greatly conduce to the convenience of the parishioners living in the vicinity of the said church and the inhabitants generally of the said county borough." No disturbance of remains is contemplated, and provision has been made for the preservation and identification of certain tombstones which will be interfered with. The corporation agree to pay 500*l.* as consideration for the easement. I hold the grant of this application to be within my discretion, but that discretion "must be a sound discretion having a due regard to times and circumstances, and to the rights and interests of the parties concerned": *Butt* v. *Jones*. (1) I might have to apply myself to different considerations in the case of an entire severance of a portion of the freehold, or to cases of a devotion to such secular purposes as might imply a desecration of the ground; but the corporation of Cardiff has already, with regard to a portion of the churchyard thrown into the road, assured its position by obtaining powers under an Act of Parliament (2), and now desires while the works under that Act are in hand to complete their improvement scheme.

So far, however, as this Court is concerned, the interests of the parishioners are what I have principally to consider. The petitioners are the vicar and the churchwardens. The churchyard has been closed for burial by Orders in Council (with various extensions from 1855–59), with certain exceptions, which it is believed (except in one case which will not be affected) have become a nullity. The matter, according to the evidence given, has been before the public for a considerable time, and the proposals and plans have been before the vestry. Two vestries were held in 1896, at the second of which, on January 23, the resolutions put in, as to breadth of path, fencing,

(1) (1829) 2 Haggard 417, 424.

(2) See the Cardiff Corporation Act, 1894 (57 & 58 Vict. c. clxi.).

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The Chancellor.

amount of consideration, &c., were unanimously passed. A citation was posted up on November 28 ultimo for three Sundays, during which time the plans and papers were on view at the diocesan registry, and no opposition was entered at the hearing. Evidence was given in support of the proposals on the ground of convenience both to the public and to the parish, and that no detriment would be caused thereby to the latter; a plan of the adjoining streets was also produced. The distance of the proposed path, fifty feet from the church, prevents the possibility of the ground being wanted for the enlargement of the church, which has already been enlarged, I should imagine, to the utmost limit. The population of the parish alone is stated at 20,000. The pathway, if of convenience to the enormous public of Cardiff, which it is clear it must be from the narrowness of the streets surrounding the church and churchyard and other considerations, must necessarily be so to the parishioners in the more immediate neighbourhood. There is already in the churchyard an existing path to the south aisle porch, to which the proposed path would give more immediate access, and in fact it appeared to me on inspecting the churchyard that there had been a path formerly in use across the churchyard on the line of that proposed, as seems to be borne out by the fact that there are gates in the existing railings at both ends. Mr. Sargeaunt, one of the petitioners, stated that he did remember the old footpath, though why or when exactly closed seems uncertain. But putting aside the fact that this proposal may be but a reopening of this former footpath with an enlargement, the Court has undoubtedly jurisdiction to grant the parishioners access by faculty: *Walter* v. *Mountague* (1); *In re St. George's-in-the-East.* (2) Next, as to the right of way. The following words were used by Lord Penzance in the case of St. Gabriel's, Fenchurch Street (*The Rector and Churchwardens of St. Gabriel, Fenchurch Street* v. *The City of London Real Property Co.*) (3), in the Arches, speaking of the rights which can be legally granted over churchyards: "The exact nature of the rights granted is always in these cases a more or

(1) (1836) 1 Curt. 253. (2) (1876) 1 P. D. 311, at p. 313.
(3) [1896] P. 95.

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The Chancellor.

less puzzling thing. . . . An exclusive right of way through a churchyard is one which may be hardly known in the law; but a right of way between one point and another to be exercised by certain people is a familiar thing."

The facts then being that the opening of a pathway for the parishioners involves no such devotion to secular purposes as to be a desecration, and that the public in country churchyards have frequently a right to traverse them, it cannot be said in the case before the Court that there would be any desecration if the prayer of the petitioners is granted for a footway for the parishioners with an easement for the public grafted on to it. But it will be made clear by the faculty that the footway remains an integral portion of the existing churchyard, with certain limitations on its use. I come next to the agreement with the corporation. The proposals in one clause of it, namely, that the 500*l.* agreed to be paid in consideration should be paid over in trust to the vicar and churchwardens for a repair fund for the church or churchyard, I am unable to accede to, on the ground that the vicar has no power to bind his successors, and that they would have a right during their incumbency to the dividends, for it appears that no portion of the burial fees belong to the churchwardens, and that the vicar alone has a claim to them. (See *Ex parte Rector of Liverpool.*) (1)

The provisoes to be inserted in the faculty will be as follows:—

That the 500*l.* given by the corporation be paid over to the Governors of Queen Anne's Bounty as an addition to the endowment of the benefice.

That before the removal of the surface soil above the proposed footway, the position of each tombstone on the plan be marked by a special number, a corresponding number inserted over the site in the asphalt, and two schedules prepared with the same numbers and inscriptions, one to be kept by the corporation and the other by the vicar and churchwardens; and, further, that the material removed from the surface be carefully screened, and all soil distributed in the churchyard, and that if any human

(1) (1870) L. R. 11 Eq. 15.

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remains be disturbed, they be reverently reinterred with due sanitary precautions.

That a lamp be placed at either end of the footway, and that posts, not in any case to be fewer than four in number, be so arranged as to prevent all usage other than pedestrian.

That the corporation to the utmost of its ability use all precautions necessary for the preservation of order and decency over the footway (more especially during Divine Service on Sundays), for which purpose detailed regulations on points to be mentioned in the faculty are to be made, and placed on notice boards, ending with a provision "that nothing in such regulations shall prejudice the rights and privileges of the vicar and churchwardens of the parish of St. John's, Cardiff, over the said churchyard"; and, further, that the corporation shall submit these regulations to the vicar and churchwardens for approval.

That the path be closed once a year to shew that it is an integral portion of the churchyard, and that such closing take place on Good Friday in each year from the hour of 10 A.M. until the hour of 3 P.M.

Also, that chains, padlocks, or other effectual means of closing the footway be provided by the corporation for the use of the vicar and churchwardens.

The faculty is therefore granted in accordance with the prayer of the petition, but subject to and modified by the provisoes above mentioned, for a proposed footway for the parishioners of St. John's, together with an easement or right of way over it for the public so long as the same shall be required for public convenience, but provided always that if at any future time the user of the right of way by the public should cease and determine, it shall then be lawful (should it so seem expedient) to remove the railings and incorporate the said footway again in the body of the said churchyard. The faculty is not to issue from the registry until the expiration of fifteen days from the day of the delivery of this judgment.

Solicitors for petitioners: *Crawley & Arnold.*

C. F. J.

1898
Jan. 20.

[IN THE COURT OF ARCHES.]

[ON APPEAL FROM THE CONSISTORY COURT OF LICHFIELD.]

NEVILLE AND PARKER-JERVIS *v.* KIRBY AND CARRINGTON-SMITH.

Ecclesiastical Law—Appeal—Jurisdiction—Criminal Suit against Rector for Non-repair of Chancel—Repairs done by Churchwardens—Practice—Dismissal of Appeal without hearing Argument—Surrogate.

Where on an appeal by promoters it appeared from the process transmitted to the Arches Registry that the Court below had no jurisdiction over the cause in which the appeal was asserted, and might be liable to be stopped by a writ of prohibition if it entertained the appeal, the Court of Arches, having before it an application by the appellants for leave to proceed with the appeal, notwithstanding the proper time for filing the appellants' proxy had elapsed, dismissed the appeal with costs without hearing arguments from either the appellants or the respondent.

The Ecclesiastical Courts have no jurisdiction to entertain a criminal suit against a lay rector who has neglected to perform his duty of repairing the chancel of the church of which he is the rector, unless the chancel was out of repair at the time of the institution of the suit.

THIS was a cause by virtue of the office of the judge at the voluntary promotion of Nigel Charles Alfred Neville, of Shenstone House, Lichfield, and Thomas Swinfen Parker-Jervis of Footherley Hall, Lichfield, churchwardens of the parish church of Shenstone, in the county of Stafford, and diocese of Lichfield, against Thomas Carrington-Smith, of Admaston, Rugeley, in the county of Stafford in the diocese of Lichfield, and Alfred Octavius Kirby, of 11, Great George Street, Westminster, impropriators of the great tithes, "or owners of rent-charges in lieu of tithes issuing out of lands situate within the parish of Shenstone aforesaid," to answer certain articles charging them with having offended against the laws ecclesiastical of this realm and against the peace and unity of the church in the several particulars set out in the citation in the suit.

The citation in the suit citing the defendants to appear within fifteen days of the service thereof was issued on November 27, 1896. The material particulars set forth therein were

to the effect that the defendants were jointly entitled to and in receipt of certain rent-charges in lieu of tithes within the parish of Shenstone aforesaid, and were the rectors of the parish church of Shenstone, and respectively liable to repair and keep in repair the chancel of the said church; that the said chancel was recently urgently in need of repair, damage having been done to it by storms in January and March, 1895; that, after notice given to the defendant A. O. Kirby that he ought to repair the damage, at the Easter vestry of the parish it had been decided to take steps to carry out the repairs and enforce the duty of undertaking the liability thereof upon the defendants, and further notices to both defendants, that unless the defendants objected the promoters, the churchwardens of the parish, would under protest execute the repairs, reserving their rights of reimbursement from the defendants as lay rectors of the parish, the said repairs, the defendants not objecting, but neglecting of themselves to do the work, were done by workmen on the instructions of the promoters at the cost of sixteen pounds, an amount or their proportion of which the defendants, though repeatedly applied to, had up to the date of the citation omitted, neglected, or refused to pay; and that in 1895, and since, the defendant Carrington-Smith was of Rugeley, in the diocese of Lichfield, and the defendant Kirby, of the city of Westminster, in the diocese of London, and both were by reason of the premises subject to the jurisdiction of the Consistory Court of Lichfield.

The defendant Carrington-Smith appeared absolutely; but an appearance under protest was entered for the defendant Kirby, and on his behalf a petition on protest was brought in on December 11, 1896, in which he prayed that the suit should be dismissed as against him for the following reasons, namely:—

(i.) That the citation to the said A. O. Kirby to enter an appearance in the suit within fifteen days after service of such citation was beyond the powers of the Court.

(ii.) That the particulars set forth in the citation did not shew any offence on the part of the said A. O. Kirby against the laws ecclesiastical and against the peace and unity of the church for which the said A. O. Kirby could lawfully be

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cited to appear in the Court, or over which the Court had jurisdiction.

(iii.) That the said A. O. Kirby resided at Coombe, in the county of Surrey and diocese of Rochester, and was not during any part of the year 1895, and had not at any time since, been resident or commorant in the diocese of Lichfield, and was not therefore amenable to the jurisdiction of the Court. (1)

An answer to the petition on protest was brought into the registry on December 26, 1896, alleging that the defendant Kirby, as being one of the lay rectors of the parish church of Shenstone, and entitled to certain rent-charges arising out of lands there and to the freehold of the chancel of the same church, was liable to certain rights and duties therein arising as set forth in the above citation; that he had been duly cited for wilful neglect and refusal to perform his duties and liabilities in respect of the chancel of the said church, and to the diocese within which the said spiritual offence had been committed; that by reason of these allegations, and of being as such freeholder an inhabitant of the diocese of Lichfield, the defendant Kirby was amenable to the jurisdiction of the Court; and that the petition was irregular and contrary to practice in a criminal suit at the time and place when the same was presented, the articles not having then been either presented or served, and was unnecessary and ought to be dismissed.

The particulars set forth as above mentioned in the citation were repeated in the articles, which further concluded with an article in the following terms:—

"That all and singular the premises were and are true . . . . of which legal proof being made we will that . . . . for such your offences against the laws ecclesiastical you be by us and our authority duly and accordingly to the exigency of the law corrected for your neglect in the premises, and declared to be the lay rectors of the parish of Shenstone aforesaid, and as such legally compellable to repair the chancel of the said parish church of Shenstone aforesaid, and be admonished and corrected for your neglect in that respect, and to refrain from the like neglect

(1) The allegations in the petition were verified by an affidavit made by the defendant Kirby.

in the future; and further we declare that the said N. C. A. Neville and T. S. Parker-Jervis, as churchwardens of the parish of Shenstone aforesaid, were, in the circumstances set forth in the foregoing articles, acting as agents for and on behalf of you the said T. Carrington-Smith and A. O. Kirby, and on your authority, express or implied, in doing or causing to be done the said repairs to the chancel of the said church; and further or alternatively we declare that they, the said churchwardens of the said parish, directed the said repairs to be done in accordance with their lawful duty in order to avoid damage to the fabric of the chancel of the said church by reason of your neglect aforesaid, and that you the said T. Carrington-Smith and A. O. Kirby be ordered and admonished to pay to the said N. C. A. Neville and T. S. Parker-Jervis the said sum of sixteen pounds so expended by them in repairing the chancel of the said church, and that you, the said T. Carrington-Smith and A. O. Kirby, be condemned in the costs hereby incurred and to be incurred on the part of the said promoters . . . . and compelled to the like effectual payment of the said sum of sixteen pounds and of the said costs."

1897. Jan. 8. The petition on protest came on for hearing before the Chancellor of the Diocese of Lichfield (the Hon. Robert Charles Herbert), together with a motion for the admission of the articles.

P. V. Smith appeared for the defendant under protest in support of the petition and protest.

Harold Hardy appeared for the promoters, and prayed the Court to dismiss the petition on protest as irregular and unnecessary, to assign the defendant under protest to enter an absolute appearance, and to decree that the articles should be admitted to proof.

The defendant Carrington-Smith in person opposed the admission of the articles.

The act of Court entered in the registry at Lichfield was, so far as it related to the decision of the Chancellor on the application of the defendant Kirby, to be dismissed from the suit in terms as follows: "The Chancellor, having heard counsel on

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both sides, said that his difficulty throughout had been the delay in instituting the suit: that if the suit had been instituted at once he would have had no hesitation in dealing with it. But, as it was now a question of payment for repairs already done, he did not see that it came within the power of the Court to issue a monition for payment. He therefore allowed the protest of the defendant Kirby, admitted his petition, and dismissed the said Kirby from the suit with costs."

The motion for the admission of the articles was refused by the Chancellor.

The promoters appealed.

The usual monition for process (1) was extracted on July 1, 1897, and in obedience thereto the proceedings had and done in the suit in the Court below were duly transmitted to the registry of the Arches Court.

The inhibition and citation in the appeal issued on the same July 1, citing both the said A. O. Kirby and T. Carrington-Smith to enter an appearance within six days after the service thereof; and on July 17 last an appearance as respondent was entered for the defendant A. O. Kirby, and a libel of appeal prayed. (2)

No further step to prosecute the appeal having been taken by or on behalf of the promoters, the solicitors for the respondent on December 4, 1897, gave notice of an application to the Dean of Arches to dismiss the appeal for want of prosecution, and on December 24, 1897, an affidavit was filed on behalf of the promoters in which it was stated that they were ready and desirous of bringing the appeal to an issue forthwith. In this

(1) The process was required by the monition to be transmitted on the tenth day after service of the monition.

(2) The Reporter has been favoured with the following statement as to the practice followed by the Court of Arches in the present case:—

"It is not customary for applications of this kind to the discretion of the judge for enlarging any of the times prescribed by the rules and practice of the registry or sanctioning any departure from them, to be the subject of a sitting in court with attendance of counsel. Such applications are disposed of by the surrogate acting under the direction of the judge, who has all the papers before him and all necessary facts on affidavit. Such has always been the practice in the registry of the Arches Court, and it was followed in the present case by the registrar. He made arrangements with Dr. May, the surrogate, and fixed a day with him for dealing with the case."

affidavit it was also stated that the Court below had appeared to give the greatest importance to the point that the articles asked for payment of money which had been expended by the promoters in repairing the chancel, and to the argument that the Court had no power to order the payment of money, whilst overlooking the importance to the parishioners of Shenstone of obtaining a decision that the respondent had offended in having refused to repair the chancel, and that if opportunity had been given to the promoters they would have asked leave to amend the articles by striking out the part relating to the payment of money.

1898. Jan. 20. On this day the registrar of the Court of Arches, having previously given notice to the proctor for the appellants and the solicitors for the respondent that the judgment of the Dean of Arches on the respondent's application to dismiss the appeal would be read by a surrogate of the Court, a sitting of the Court of Arches was held before a surrogate for that purpose. (1)

Harold Hardy, appeared for the appellants.
P. V. Smith, for the respondent.

The surrogate (Rev. Frederic Schiller May), the counsel for the appellants and for the respondent both submitting that the application had never been heard or argued and protesting against any decision being given against their respective parties without their having been heard, stated that the Court was only held in order that the judgment of the Court on the application to dismiss the appeal should be delivered, and read the following judgment of the Dean of Arches (the Right Honourable Lord Penzance) :—

This is in effect an application to the Court for leave to

(1) The 6th and 32nd rules of the Arches Court Rules, 1867, are as follows :—

"6. On an appearance being entered a duplicate copy thereof shall be given to the proctor returning the decree who shall file his . . . . libel in the registry within six days from his having such notice and deliver a copy thereof to the proctor for the party cited."

"32. It shall be competent to the judge on application in chambers, supported by affidavits if necessary, to shorten or extend the times fixed by the foregoing . . . . rules."

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proceed with an appeal from the Diocesan Court of Lichfield, though the time prescribed for so doing has been allowed to elapse.

It may be well to state shortly the facts which have given rise to the present suit. The promoters are the churchwardens of the parish of Shenstone. In the year 1895 some stormy weather damaged the roof of the chancel of their church. They called upon the defendants, as being the lay rectors, to repair it. The defendants repudiated their liability and refused. The churchwardens, being advised that prompt measures should be taken to make good the damage, determined to do the work themselves, expecting that they could afterwards oblige the defendants to reimburse them; and accordingly the church was properly repaired at a cost of 16*l*. To recover this not very large sum of money the present criminal suit was instituted. A citation from the Diocesan Court was served on the defendants, and articles were exhibited against them in which, after stating the above facts, payment of the 16*l*. was insisted upon. The defendants, who appeared under protest, opposed the reception of the articles, and in addition, for other reasons, urged by petition that the suit should be dismissed. The whole matter was heard and discussed before the diocesan judge on January 8, 1897. He dismissed the defendants from the suit, declaring that the Court had no power to entertain such a suit as this for a money claim, and stated that, had the matter been brought before him at first, he could and would have dealt with it. In all this I entirely agree with him. The promoter's proctor at once protested of a grievance, and appealed to the Court of the Archbishop. It was not, however, until the very close of this last year, 1897, that any active steps were taken to prosecute this appeal. By that time, in consequence of the delay, it became necessary, in accordance with the rules and practice of the registry, to obtain the leave of the Court before the proctor of the promoters could be allowed to file his proxy and the libel of appeal. Hence the present application; and under ordinary circumstances there would be no difficulty in acceding to it upon such terms as to payment of costs as the equity of the case might require. But this is

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far from being an ordinary case, for the important question here raised is nothing less than the question of jurisdiction. This Ecclesiastical Court, like all other Ecclesiastical Courts, is a Court of limited jurisdiction only; and the judge and all others concerned in prosecuting a suit which deals with matters that lie outside the proper jurisdiction of the Court are liable to be stopped by a writ of prohibition, which is granted without difficulty in a proper case upon motion made in the Common Law Courts.

It is necessary, therefore, to pause before granting the present application. For if the matter involved in the suit is plainly beyond the reach of ecclesiastical jurisdiction, it becomes my duty to see that no steps should be taken in this Court to further such a suit. The learned judge of the Diocesan Court is clearly of opinion that the claim which the citation and articles are framed to enforce is beyond the jurisdiction of the Court; and I agree with him. The ecclesiastical jurisdiction in reference to the chancel of a parish church is based upon the duty of upholding and maintaining in safety and security the fabric of the church itself. If this is jeopardised, the Ecclesiastical Courts have time out of mind interfered to impose upon those who may be bound to repair it the discharge of that duty by timely and reasonable repairs. If the chancel of a parish church is in need of repair, the Ecclesiastical Court entertains a suit complaining of its defective condition, and, on proper proof as to the persons liable to repair, it issues a monition to such persons, commanding the thing to be done, which it follows up, if need be, by the usual ecclesiastical censures. But this is the limit of the Court's interference, and there is no precedent or warrant for the exercise of the coercive powers of the Court to enforce against a layman a payment of a money claim. Nor does its right and jurisdiction to interfere exist at all unless the fabric of the church is in a defective state at the time when the office of the judge is sought to be promoted. It has been ingeniously suggested that, supposing the suit to fail as respects the repayment of the money spent on the repairs, the citation and articles might have been amended by dropping the claim for repayment, and treating the substance of

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the suit as a complaint that the chancel had been at a certain time out of repair, and that the defendants committed a breach of ecclesiastical law in failing to repair it. In answer to this suggestion, it is enough to say that no such amendment has in fact been made, and that this Court of Arches, like all other courts of appeal, must deal with the case as it stood in the Court below at the time when the judgment appealed from was given. But I might go further. No such suit as suggested by the suggested amendment could, in my opinion, have been maintained in the Diocesan Court. The basis upon which the jurisdiction of the Ecclesiastical Court in a matter of this kind stands, being, as I have already pointed out, an existing necessity for repair to the fabric of the church, it follows that where no such necessity exists there can be no warrant for the intervention of a court of ecclesiastical jurisdiction.

I may further point out that if such a suit could be maintained, the position of the churchwardens in case of subsequent injury to the chancel would not thereby be at all advanced or improved, for in such a case a fresh suit to enforce the duty of repair upon the defendants would be unavoidable.

It has been from very early times the practice of the Ecclesiastical Courts in criminal suits to follow up the sentence by an admonition not to offend in like manner again. But these admonitions have never made it practicable to dispense with a fresh citation and fresh articles where a conviction is sought for a fresh offence.

The present application for leave to be allowed to proceed with the appeal must therefore, for the reasons I have given, be refused, and the appeal dismissed with costs and remitted (save as to the costs of this appeal) to the Court below. (1)

Proctor for appellants: *Jenkins.*

Solicitors for respondent: *Kirby, Gedge, Kirby & Millett.*

(1) The judgment was signed—"Penzance."

An appeal to the Privy Council against this decision was asserted by the appellants (plaintiffs in the Consistory Court of Lichfield), but was abandoned before it was ready for hearing.

C. F. J.

COFFEY *v.* COFFEY.

1898
April 21.

Divorce—Rape—Divorce Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 27 (1).

A respondent, who had been convicted, under s. 4 of the Criminal Law Amendment Act, 1885, of an attempt to have unlawful and carnal knowledge of a girl under the age of thirteen, was found to have been guilty of rape, and a decree nisi granted for the dissolution of his marriage.

UNDEFENDED divorce case.

The petitioner Ada Coffey claimed that her marriage with the respondent Herbert Coffey should be dissolved, on the ground that he had in 1896 and 1897 committed adultery with Emily Collings, and had on July 2, 1897, committed a rape upon Caroline Fernley.

It appeared that the respondent had left his home at East Sheen, Surrey, with Emily Collings, that they had lived together in Jersey and at Reading as man and wife under an assumed name, and that while at Reading he had been arrested for a criminal assault upon Caroline Fernley, his servant, a girl under thirteen years of age. He was convicted at the Reading Assizes, under s. 4 of the Criminal Law Amendment Act, 1885 (2), of an attempt to commit a rape, and was sentenced to eighteen months' imprisonment with hard labour. There was no count for rape in the indictment.

Caroline Fernley was called and gave evidence which shewed

(1) By the Divorce Act, 1857 (20 & 21 Vict. c. 85), s. 27, "It shall be lawful for any wife to present a petition—praying that her marriage may be dissolved on the ground that, since the celebration thereof, her husband has been guilty of . . . . rape."

(2) By the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 4, "Any person who unlawfully and carnally knows any girl under the age of thirteen years, shall be guilty of felony, and, being convicted thereof, shall be liable at the discretion of the Court to be kept in penal servitude for life, or for any term not less than five years, or to be imprisoned for any term not exceeding two years, with or without hard labour."

"Any person who attempts to have unlawful carnal knowledge of any girl under the age of thirteen years shall be guilty of a misdemeanour, and, being convicted thereof, shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour."

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that the respondent had been guilty of rape. Her evidence was confirmed by that of her mother. The doctor who examined her and gave evidence at the trial was proved to be dead.

[GORELL BARNES J. The respondent should have been indicted for rape.]

Barnard, in support of the petition, submitted that the Court should find that he had committed that offence, and should dissolve the marriage.

GORELL BARNES J. granted a decree nisi for the dissolution of the marriage.

Solicitors: *Heath, Parker & Brett.*

H. D. W.

1898
May 13.

THE PACIFIC.

Admiralty—Salvage (Life)—Foreign Vessel—Jurisdiction—Services "wholly or in part within British waters"—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 544, *sub-s.* 1.

By s. 544, sub-s. 1, of the Merchant Shipping Act, 1894, "Where services are rendered wholly or in part within British waters in saving life from any . . . . foreign vessel . . . . there shall be payable to the salvor by the owner of the vessel, cargo, or apparel saved, a reasonable amount of salvage. . . . ."

A British steam-trawler whilst on a fishing voyage in the North Sea, and about ninety miles north-east of the Spurn, fell in with a water-logged Norwegian barque. After some difficulty the trawler rescued the crew of the barque, and the next day landed them at Hull. The barque was subsequently saved by other salvors, and brought into Grimsby. In an action for life salvage by the owners, master, and crew of the trawler, it was contended by the defendants, the owners of the barque and of her cargo, that there was no jurisdiction under the statute to make an award:—

Held, by Sir F. H. Jeune, President, that the plaintiffs were entitled to life salvage, as the salving vessel, in the course of effecting the salvage service, was within British waters, and, therefore, the services were rendered "in part within British waters" within the meaning of the statute.

ACTION FOR LIFE SALVAGE. The plaintiffs were the Hull Steam Fishing and Ice Company, Limited, the owners of the

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Jersey, and her master and crew. The defendants were the owners of the *Pacific*, her cargo and freight.

The question turned on the meaning of the words "in part within British waters" in s. 544 of the Merchant Shipping Act, 1894. (1)

The material facts were shortly as follows:—

On the morning of March 27, 1898, the steam-trawler *Jersey*, of 139 tons gross and 56 tons net register, manned by a crew of nine hands all told, was on a fishing voyage in the North Sea about ninety miles north-east of the Spurn, when a vessel was seen flying signals of distress, which proved to be the *Pacific*, a Norwegian barque of 589 tons register and twelve hands, with a cargo of deals from Fredriksstad to Antwerp. She had met with heavy weather, her deck cargo was adrift, and she had become water-logged and unmanageable.

The *Pacific* launched her lifeboat and, after some difficulty, as there was a north-easterly gale blowing, with a heavy sea, the whole of the crew were got on board the *Jersey*. As the weather was too bad to attempt to save the barque, the *Jersey* proceeded to Hull, where, on the following day, the crew of the *Pacific* were landed.

The value of the *Jersey* was 4000*l*., and the shortening of her fishing voyage by three days involved her owners in a loss of about 45*l*.

On the afternoon of the 27th the *Pacific* was sighted by the steam-trawler *Sturgeon*, of forty-five tons net register, nine hands, and of the value of 4000*l*. An attempt was made to put a light on board the derelict vessel, but the state of the weather was such as to prevent the boat's crew from the trawler boarding her. Early the next morning, however, the mate and two hands were sent to the *Pacific*, and succeeded in cutting away some of the deck cargo which was overboard, but fast to the vessel on the port side. In the meantime the steam-trawler *Eagle*, of seventy tons net register, nine hands, and of the value

(1) 57 & 58 Vict. c. 60, s. 544, sub-s. 1: "Where services are rendered wholly or in part within British waters in saving life from any . . . . foreign vessel . . . . there shall be payable to the salvor by the owner of the vessel, cargo, or apparel saved, a reasonable amount of salvage. . . ."

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of 4000*l.*, came up, and, at some risk, put her mate and two hands on board the barque. The *Eagle* then tried to tow the *Pacific*, but, the hawser having parted, sail was made on the *Pacific*, and partly by sailing, and partly by the towage of the *Eagle*, the *Pacific* was, on the morning of March 29, brought into the Humber, and, with the aid of two tugs, safely anchored.

The value of the *Pacific* in her damaged condition was 175*l.* The value of her cargo was disputed; but the Court, for salvage purposes, held it to be from 1335*l.* to 1935*l.*

The salvage actions of the three trawlers were consolidated and tried together, but only the arguments on behalf of the *Jersey* call for report. The defendants admitted the facts alleged in the statement of claim of the *Jersey*, but pleaded that the action, being for life salvage only, should be dismissed with costs on the ground of want of jurisdiction, as the services rendered were not wholly or in part within British waters.

Butler Aspinall, for the plaintiffs, the owners, master, and crew of the *Jersey*. In *The Johannes* (1) Dr. Lushington considered the effect of the powers conferred on the Court by ss. 458, 459 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), but decided that they did not give the Admiralty Court jurisdiction over salvage of life only, from a foreign ship, performed on the high seas, at a distance of more than three miles from the shores of the United Kingdom. It is submitted, however, that the defect in that Act was remedied by s. 9 of the Admiralty Court Jurisdiction Act, 1861 (24 Vict. c. 10), by which the services might be rendered "in part in British waters." These words are repeated in s. 544 of the Merchant Shipping Act, 1894. In *The Willem III.* (2) no salvage award was made to the French schooner which picked up, on the high seas, the crew and passengers of the Dutch vessel which had been on fire, because the schooner transferred these persons to a British steamer which carried them into an English port, but did not herself come within British waters during any portion of the time when the services were rendered. In the

(1) (1860) Lush. 182, at p. 189. (2) (1871) L. R. 3 A. & E. 487.

present case, however, the conveyance of the crew of the *Pacific* was the object of the passage of the *Jersey* to Hull, and formed part of the salvage services, which were, therefore, rendered "in part" in British waters. [Reference was also made to *The Cairo*. (1)]

Carver, Q.C., for the defendants, the owners of the *Pacific*, her cargo and freight. The terms of s. 544 of the Merchant Shipping Act, 1894, make the owners of the vessel personally liable for life salvage; but there is no intention to legislate against a foreign shipowner who does not come within the jurisdiction, for the provisions of the section must be read in the light of the interpretation applicable to a statute of this character, so that it will not be presumed to extend the jurisdiction beyond the territorial limit: see Maxwell's Interpretation of Statutes, 3rd ed. p. 196; *The Zollverein*. (2)

It is also clear that s. 544 was only intended to deal with services within British waters, as where there is a convention with a foreign government in respect of life salvage, when the ship is beyond the limits of British jurisdiction, then by s. 545 the provisions of the Act are to apply to those services "as if they were rendered in saving life from ships within British jurisdiction"; in other words, in the case of saving life from foreign vessels, the right to salvage reward is dependent upon the service having taken place within the limits of British jurisdiction, or the vessel, from which the lives were saved, must belong to a State in regard to which an Order in Council has been made: see the comments on the repealed provisions of s. 59 of the Merchant Shipping Act Amendment Act, 1862, in Kennedy on Salvage, p. 49.

The words used in s. 544 of the Act of 1894 are "saving life from any foreign vessel," and the services were, therefore, rendered wholly outside British waters, as they were complete when the crew ceased to be any longer in danger, that is, when they were taken off the *Pacific*. Hence there is no jurisdiction to award life salvage in this case.

Butler Aspinall, in reply. The difference in the wording of ss. 544 and 545 of the Merchant Shipping Act, 1894, arises

(1) (1874) L. R. 4 A. & E. 184. (2) (1856) Sw. 96.

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THE PACIFIC.

from that consolidating statute borrowing the sections from different statutes, but s. 545 was not intended in any way to limit the plain meaning of s. 544.

THE PRESIDENT (SIR F. H. JEUNE). I think the construction to be put upon s. 544 of the Merchant Shipping Act, 1894, is sufficiently covered by authority to prevent my having any serious doubt about the matter. What I understand from the facts in this case is that there was a foreign vessel, outside British waters, from which the crew were rescued by a British ship, and brought within British waters and landed on the English shores. That raises very neatly the question whether the persons who so saved the seamen from the foreign vessel are entitled to salvage.

It is clear that they would not be entitled to salvage jure gentium, because, before the Act of 1854, there could have been no life salvage in such a case. Then we have to see what the effect of that statute was. Its effect is well illustrated by the case of *The Johannes*. (1) By s. 458 of that Act salvage could be granted, amongst other cases, in the following: "Whenever any ship or boat," that is, including a foreign ship, "is stranded, or otherwise in distress on the shore of any sea or tidal water situate within the limits of the United Kingdom." In the case before Dr. Lushington what happened was this: a Prussian vessel was wrecked seventy miles east of Yarmouth, and her crew were taken off her, other salvors afterwards bringing the ship into Grimsby. Life salvage was claimed by the persons who had taken these foreign sailors and brought them to Hull. Dr. Lushington decided that the claim under that section of the Act could not be maintained, because the limits of the United Kingdom meant three miles, and the sailors had been brought within the limits of the United Kingdom, but the words of the section were clear that the ship or boat must be stranded or otherwise in distress on the shore of any sea or tidal water situate within the limits of the United Kingdom. When the words of the section are looked at, it is easy to understand the language of Dr. Lushington. He uses a phrase

(1) Lush. 182.

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which might be taken to mean that the service of saving life was rendered outside the limits of the United Kingdom. By that he does not mean that the whole of the services was rendered there, because all he meant to say, and all that it was necessary to say, was that the ship in distress was outside, not within, the limits of the United Kingdom. I have no doubt it was the hardship pointed out by Dr. Lushington in that case which gave rise to the statute of 1861; and in that statute the Legislature dealt with the matter, and by s. 9 provided that all the provisions of the Merchant Shipping Act of 1854 in regard to life salvage should apply in the case of "any foreign ship where the services have been rendered either wholly or in part in British waters." I cannot doubt that that meant to deal with such a case which had arisen in *The Johannes* (1), where the service was rendered in part within British waters, although the ship itself was outside British waters when in distress.

It must be a question of fact in every case whether the service is rendered wholly or in part in British waters. The test of that appears to me to be whether what was done by the salvors for the purpose of saving life was done wholly or in part in British waters. I can imagine cases where people might be salved from a vessel and then might be taken very considerable distances, perhaps for a long voyage, by the vessel which salved them, and then come within British waters. It could not be said that that was a case of salvage services being performed in part in British waters, because it is evident that the salvage services finished long before the vessel came within British waters at all. It is clear that one must be guided by practical considerations in each case, and what you have to look at is whether the salving vessel in the course of effecting the salvage service is within British waters.

It is, however, argued that one ought not to give so extended a meaning to the section in the Act of 1861, or in the later Act of 1894, which practically repeated that section, because you ought not to construe an Act of Parliament to affect foreigners unless it is clear that the words of the section do so, as for obvious reasons it would be contrary to the comity of nations

(1) Lush. 182.

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for one nation to presume to legislate for the subjects of another. You must always consider what the meaning of the words is, and, apart from other considerations, where an Act of Parliament has said in terms that the services are to be performed wholly or in part within British waters, it must, I think, be understood to mean what it says; and so understood it does not appear to me to conflict in any way with such comity as nations extend to one another in such a matter, because if foreign sailors are saved from a foreign vessel and brought to an English port in the course of saving their lives, it would seem that the English Legislature has a perfect right to say that the owners or the ship may be made liable for services rendered, in part at any rate, to foreign sailors within the limits of English jurisdiction.

That being to my mind the clear view to be taken of s. 544 of the Act of 1894, I do not think it is to be regarded as cut down by s. 545, because, although the exact words of s. 544 are not followed, I think the reason for the different language of the two sections has been very clearly put by the counsel for the plaintiffs. Under those circumstances I do not feel any difficulty in saying that in such a case as this the salvage service is one for which a reward can be claimed, and I think further that the decision in the case of *The Willem III.* (1), and to some extent the case of *The Cairo* (2), bear in the same direction. I am not concerned to consider whether the decision in the case of *The Willem III.* (1) was a correct decision or not. I assume that it was. I assume that it was quite correct to say that although the services were to be considered as a whole, still that they were not to be considered as services in the whole of which each salvor participated; and although, therefore, the services are to be considered as a whole for some purposes, they were not to be considered as a whole in the sense of saying that the *Flora*, which took part in the operation outside British waters, was entitled to life salvage, although the *Scorpio*, which performed a portion of the services in British waters, was so entitled. It is not necessary for me to consider that. It has been decided, it appears to me quite clearly, that if the

(1) L. R. 3 A. & E. 487. (2) L. R. 4 A. & E. 184.

Flora had carried the persons within British jurisdiction she would have been entitled to a salvage award. That is precisely the condition raised in the present case. I do not think it necessary to refer further to the case of *The Cairo*. (1) Under those circumstances I think this case ought to proceed, and that the plaintiffs (the *Jersey*) have the right to claim life salvage.

I have, therefore, to consider the award which is to be given, first of all, taking the vessels in order of time, to the *Jersey*, which saved the lives of the twelve persons who were on board the *Pacific*; secondly, to the *Sturgeon*, which discovered her when in a derelict condition; and to the *Eagle*, which, with the *Sturgeon*, eventually brought her safely into port. The circumstances of the case, I think—both the facts and the inferences to be drawn—are really beyond question. [The learned judge then dealt with the facts already set out, and continued:—] The value of the *Pacific* itself is only 175*l.*, which shews, I think, the condition to which she must have been reduced. The value of the timber is in dispute. It is valued on one side at 1335*l.*, and on the other at 1935*l.* I have had to decide what is the fair sum to take for the value of that timber; and now, having regard to all the circumstances of the case, and after careful consideration, with the Trinity Brethren, of the nautical questions involved, I think that the proper sums to be awarded are as follows: To the *Jersey*, for the saving of life, including expenses, I give the sum of 153*l.*; to the *Eagle* I give the sum of 450*l.*, and to the *Sturgeon* 260*l.*—making a total of 863*l.*

Solicitors for plaintiffs, the owners, master, and crew of the *Jersey*: *Pritchard & Sons, for J. T. & H. Woodhouse, Hull.*

Solicitors for defendants, the owners of the *Pacific* and of her cargo: *Stokes & Stokes.*

(1) L. R. 4 A. & E. 184.

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May 10, 11, 17; June 21.

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Judicial Separation—Jurisdiction—Domicil—Matrimonial Home—Residence within Jurisdiction at Commencement of Suit—Cruelty committed outside Jurisdiction—Apprehension of further Acts of Cruelty—Power of Ecclesiastical Court to Grant Relief—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *ss.* 7, 22, 25, 26.

Applied. MATALON *v.* MATALON [1952] P. 233

By the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 22, "In all suits and proceedings, other than proceedings to dissolve any marriage, the said Court shall proceed and act and give relief on principles and rules which, in the opinion of the said Court, shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have hitherto acted and given relief."

In a proceeding for a divorce a mensa et thoro on the ground of cruelty, where the parties resided within its jurisdiction at the commencement of the suit, an Ecclesiastical Court would have granted relief irrespective of their domicil, and it would have made no difference that the necessity for protection arose in consequence of cruelty committed outside its jurisdiction, where the apprehension of further acts of cruelty remained.

The petitioner for a judicial separation had been, before her marriage, a domiciled Englishwoman. Her husband's domicil was in Australia, where, after her marriage, she resided with him. Owing to cruelty committed by him while they were travelling in Italy, she sought the protection of her parents in England, and established a home for herself and her children in this country. He followed her here and required her to return to him with the children, which she was afraid to do owing to her apprehension of a repetition of the cruelty. At the commencement of the suit both parties were living within the jurisdiction:—

Held, that the Court, exercising the power of the Ecclesiastical Court under the section, had jurisdiction to entertain the suit.

PETITION of Fanny Augusta Armytage for a judicial separation from her husband Harry Armytage, on the ground of his cruelty, and act on petition by him denying the jurisdiction of the Court, on the grounds that he was domiciled in the colony of Victoria, and that no act of cruelty had been committed within the jurisdiction. The petition and the act on petition were ordered to be heard together.

It appeared that the parties were married at Melbourne in 1888, and that there were two children of the marriage. The cruelty complained of was alleged to have taken place at

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Florence in 1897. The petitioner in consequence left the respondent at Florence and came to England, and the respondent also came to England, and settled 100*l.* on the children, with a view to making them wards of Court. On his applying for their custody she applied for a judicial separation.

The Court suggested that the argument should be confined to the question of the jurisdiction to grant a judicial separation, that of the right to the custody of the children being postponed.

Bargrave Deane, Q.C., and *Barnard*, for the petitioner. The Court has jurisdiction to grant a judicial separation. Though neither the husband's domicil nor the matrimonial home is English, he has followed his wife to England, and has taken proceedings against her within the jurisdiction.

The question of judicial separation on the ground of cruelty has been recently considered in the House of Lords in *Russell* v. *Russell* (1), and the basis of each opinion is that the Court will relieve where danger of personal injury is established. Here it is clear that the petitioner requires protection against a repetition of the cruelty committed in Italy. In *Niboyet* v. *Niboyet* (2) a majority of the Court of Appeal held that the Court had jurisdiction to grant a divorce in the case of a husband resident though not domiciled in England, on the ground that the Ecclesiastical Court, the power of which to grant a judicial separation is vested in this Court, had jurisdiction in such a case. Here the respondent was in England when cited, and this is sufficient. In *Le Mesurier* v. *Le Mesurier* (3) the Privy Council held that the jurisdiction to grant a divorce depended on domicil as opposed to residence; but Lord Watson in giving judgment said: "It is not doubtful that there may be residence without domicil sufficient to sustain a suit for restitution of conjugal rights, for separation, or for aliment." (4)

[GORELL BARNES J. This is said to have been the ecclesiastical practice. Can you prove that it was so from ecclesiastical authorities?]

(1) [1897] A. C. 395.
(2) (1878) 4 P. D. 1.
(3) [1895] A. C. 517.
(4) [1895] A. C. at p. 531.

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The jurisdiction pro salute animæ depended upon residence within the episcopal diocese at the time of citation. In Shelford on Marriage Divorce and Registration, ed. 1841, p. 486, it is stated that "In matrimonial causes the power of the Court is in personam and depends upon the locality of the person cited. Though the defendant may usually reside out of the kingdom, yet if he is served with a citation within the jurisdiction of the Ecclesiastical Court in London, as that of the Consistory Court of London, in a suit for nullity of marriage, that Court has jurisdiction to try the validity of the marriage, wherever it may have been contracted." This statement of the practice may be compared with that given by James L.J. in *Niboyet* v. *Niboyet* (1), and is supported by *Carden* v. *Carden* (2), in which Dr. Lushington stated that it was residence within the jurisdiction before the issue of the citation which gave the Consistory Court of London jurisdiction. The title of the statute of 1531 (23 Hen. 8, c. 9), is, "An Act that no person shall be served out of the diocese where he or she dwelleth except in certain cases," such as probate suits and charges of heresy before the archbishop.

A foreign husband is liable to have an order for judicial separation and maintenance made against him under s. 5 of the Summary Jurisdiction (Married Women) Act, 1895.

Inderwick, *Q.C.*, and *Lewis Thomas*, for the respondent. The Court has not jurisdiction. The right of a wife to a protection order only arises where persistent cruelty has taken place within the petty sessional division. No record can be found of any case in which an Ecclesiastical Court granted a divorce a mensa et thoro between foreigners, unless a matrimonial offence had been committed within the jurisdiction. The petitioner's proper course was to have taken proceedings in the court of the colony.

In *Niboyet* v. *Niboyet* (1) James L.J. says: "I do not think that an English (i.e., ecclesiastical) Court ought to have exercised or would have exercised jurisdiction in the case of a French matrimonial home by reason of an infidelity done during a visit or in transit to or through the English diocese. The proper

(1) 4 P. D. 1, at p. 3. (2) (1837) 1 Curt. 558.

Court in that case would have been a French Court," and lays down that "where and while the matrimonial home is English and the wrong is done here," the jurisdiction exists, but only then. (1) Brett L.J. says: "The only Court which on principle ought to entertain the question of altering the relation in any respect between parties admitted to be married . . . . is a Court of the country in which they are domiciled." (2)

[GORELL BARNES. Brett L.J. expressly says that the same rule applies to suits for judicial separation. (3)]

Cotton L.J. says: "It must be remembered that the respondent has been resident in this country, not casually or as a traveller, but for several years, and that the adultery . . . . was committed in England." (4) The three judgments are, therefore, against the right of the petitioner to sue. The Ecclesiastical Court had only jurisdiction when both the offence was committed and the parties really resided within the diocese.

[GORELL BARNES J. What, then, is the position of the petitioner? What answer has she, if the respondent proposes to resume cohabitation? Can she refuse, unless the Court has acted, and has the Court to wait till cruelty has been committed in this country before it can interfere?]

She must take the consequences of an action for restitution of conjugal rights.

In *Brodie* v. *Brodie* (5), before Sir C. Creswell, and *Manning* v. *Manning* (6) and *Wilson* v. *Wilson* (7), before Lord Penzance, residence by the respondent was held to be essential. In *Yelverton* v. *Yelverton* (8) the Court refused to entertain a suit for restitution of conjugal rights against a person not domiciled in England.

The decision of the Privy Council in *Le Mesurier* v. *Le Mesurier* (9) appears to be inconsistent with that of the Court of Appeal in *Niboyet* v. *Niboyet* (1) as regards divorce, but does not deal with judicial separation.

(1) 4 P. D. 1, at pp. 6, 9.
(2) 4 P. D. at p. 13.
(3) 4 P. D. at p. 19.
(4) 4 P. D. at p. 21.
(5) (1861) 2 Sw. & Tr. 259.
(6) (1871) L. R. 2 P. & M. 223.
(7) (1872) L. R. 2 P. & M. 435.
(8) (1859) 1 Sw. & Tr. 574.
(9) [1895] A. C. 517.

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[GORELL BARNES J. Lord Watson says in his judgment, "In cases where the residence is of a more permanent character, and the husband treats his wife with such a degree of cruelty as to render her continuance in his society intolerable, the weight of opinion among international jurists . . . . is to the effect that the Courts of the residence are warranted in giving the remedy of judicial separation, without reference to the domicil of the parties." (1) To what authorities does he refer?]

Commentators on international law treat marriage as a status; and the law of the domicil of the husband, the country in which the status is intended to exist, as consequently applicable: see Burge, Commentaries on Colonial and Foreign Law, ed. 1838, chap. 8, s. 2, p. 680, and Bar's Private International Law, translated by Gillespie, ed. 1892, p. 382.

Bargrave Deane, Q.C., in reply. In *Evans* v. *Evans* (2) the foundation of the jurisdiction for relief against cruelty is stated to be, not domicil or residence, but the reasonable apprehension of bodily injury.

Cur. adv. vult.

June 21. GORELL BARNES J. This is a suit for judicial separation by Mrs. Armytage against her husband on the ground of his alleged cruelty towards her. By his answer the respondent has denied the alleged cruelty, and by an act on petition he has further pleaded that the Court has no jurisdiction to entertain the suit. I have, therefore, to determine a question of fact, whether there has been cruelty by the respondent to the petitioner, and a question of law, whether the Court has jurisdiction in the circumstances to entertain the suit. The second question raises a point of considerable importance in private international law.

The parties were married at Toorak, near Melbourne, Australia, on April 11, 1888, and there are two children of the marriage, whose custody the petitioner seeks to obtain. The respondent is by birth an Australian, and his domicil is in the colony of Victoria. He was educated at Cambridge, and has been called to the English Bar. The petitioner is an English-

(1) [1895] A. C. at pp. 526, 527. (2) (1790) 1 Hagg. Cons. 35.

woman, born in England, of parents residing at Blackheath, near London. The respondent and the petitioner became acquainted on board ship on the passage from this country to Melbourne, and their marriage was celebrated shortly afterwards. They cohabited in Australia and in England, and afterwards in Italy, and the occurrences which give rise to this suit took place at Florence in April and May, 1897.

The letters put in at the hearing shew that as late as the year 1896 the husband and wife were living on terms of affection; but between that date and the spring of 1897 a state of friction seems to have arisen between them, the precise causes of which I have some difficulty in determining, the wife attributing it partly to temper on the part of the respondent, and partly to certain differences which she referred to in her evidence, and the husband, as I understand, attributing it to a dislike on his wife's part to residence in Australia. He also referred to correspondence in which she blamed herself for loss of self-control.

The petitioner alleges that in April and May, 1897, her husband committed certain acts of violence towards her, which caused her to leave him and come over to England with her children to seek her father's protection. These acts are denied by the husband, and he alleges that his wife has merely come to this country to endeavour to give this Court jurisdiction in the matter. It is unnecessary to go into the charges made in the case in detail. The petitioner gave her evidence very clearly, and is corroborated by her sister and a servant, and her story is supported by the strong fact that she wrote letters to her sister after that lady left her in Florence, which she stated gave accounts of what was taking place, for the purpose of obtaining advice as to her position, and that, after advice had been obtained from counsel on her behalf, her brother went over to Florence and brought her and her children to this country.

The respondent, in his evidence, gave his account of what he stated had taken place between his wife and himself, and he also put in, with the consent of the petitioner's counsel, an affidavit by another servant, which he had obtained. The respondent's evidence and this affidavit do not really answer

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the petitioner's case; statements and admissions are contained in them which tend to confirm her story, and after making due allowance for any exaggeration there may not unnaturally be in accounts given of what has taken place when those present have been excited by the occurrences, I have come to the conclusion that the petitioner has established a case of cruelty on the part of the respondent towards her at Florence in April and May, 1897. I further find that she left him in Florence and came to England bonâ fide in order to shelter herself under the care of her parents, and is now resident in this country. No acts of cruelty in this country were alleged or proved, but the petitioner stated that she remained in fear of her husband.

I have now to deal with the question of jurisdiction. The further facts necessary to refer to are these: The petitioner came to this country with her children on or about May 25, 1897, and she and the children have since resided under her parents' roof and at Bexhill. The respondent's solicitor on May 31, 1897, wrote on behalf of the respondent to the petitioner and her father requesting the petitioner to return with the children to her husband, but she declined to comply with this request. At the end of June, 1897, the respondent came to, and has since resided in, England, but I understand he has not taken up a permanent residence here, and has only come to and is remaining in England for the purpose of enforcing, and so long as may be necessary to determine, such rights as he may have against the petitioner with regard to the children. In the month of November, 1897, he settled the sum of 100*l.* on each of his children, and made them wards of Court in Chancery. He thereupon applied to North J. for an order for the custody of the children, which was met by a cross-application on the part of the petitioner. In the meantime these proceedings were commenced, and the respondent was served with the citation and petition in this country. North J. ordered the application before him to stand over until after the determination of this suit. The question to be decided, therefore, is whether or not this Court can entertain a suit for judicial separation by the petitioner against the respondent in the circumstances above stated.

It may now be taken as settled that this Court has no jurisdiction to entertain proceedings for the dissolution of the marriage of parties not domiciled in this country at the commencement of the proceedings. Although in the case of *Niboyet* v. *Niboyet* (1) it was held by the majority of the Court of Appeal that residence not amounting to domicil may give the Court jurisdiction, that case, which, if followed, would have the effect of giving the Court a jurisdiction which it does not concede to foreign tribunals, is opposed to the general current of the cases in this Court, and has been practically overruled by the decision of the Privy Council in the case of *Le Mesurier* v. *Le Mesurier*. (2) Lord Watson, in delivering their Lordships' judgment, after a review of the authorities, stated that "their Lordships have . . . . come to the conclusion that, according to international law, the domicil for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage." (3) The Court does not now pronounce a decree of dissolution where the parties are not domiciled in this country, except in favour of a wife deserted by her husband, or whose husband has so conducted himself towards her that she is justified in living apart from him, and who, up to the time when she was deserted or began so to be, was domiciled with her husband in this country, in which case, without necessarily resorting to the American doctrine that in such circumstances a wife may acquire a domicil of her own in the country of the matrimonial home, it is considered that, in order to meet the injustice which might be done by compelling a wife to follow her husband from country to country, he cannot be allowed to assert for the purposes of the suit that he has ceased to be domiciled in this country. The jurisdiction to dissolve marriages was conferred upon this Court by the Matrimonial Causes Act, 1857, and, although that Act does not expressly make domicil a test of jurisdiction, that test is applied by the Court to the exercise of jurisdiction in cases of dissolution of marriage. It is derived from the principles of private international law, an adherence to which is necessary,

(1) 4 P. D. 1. (2) [1895] A. C. 517.

(3) [1895] A. C. at p. 540.

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as Lord Penzance said in *Wilson* v. *Wilson* (1), in order to "preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another." These principles are expounded by many jurists in this and other countries. They are based on the principle that a person's status ought to depend on the law of his domicil, though there may be limitations and exceptions to this principle: see Dicey's Conflict of Laws, 1896, cap. 18, p. 474, et seq. (conf. Savigny, s. 362, Guthrie's translation, 2nd ed. p. 148).

The jurisdiction in suits other than suits for dissolution of marriage is conferred on the Court by the 6th section of the Act aforesaid. By other sections judicial separation is substituted for the old divorce a mensa et thoro, and a new ground for separation, namely, desertion without cause for two years and upwards, is added. Sect. 22 provides as follows: "In all suits and proceedings other than proceedings to dissolve any marriage, the said Court shall proceed, and act, and give relief on principles and rules which, in the opinion of the said Court, shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained, and to the rules and orders under this Act." There are no special provisions of the Act or rules or orders which directly affect the present question. The present suit is for judicial separation on the ground of cruelty. Before the Act it would have been a suit for divorce a mensa et thoro on the same ground, and the inquiry is as to the principles and rules on which the Ecclesiastical Courts would have acted in the circumstances. The petitioner maintains that the test of domicil is not applicable as in a suit for dissolution of marriage, and that the Ecclesiastical Courts would have given her relief where she and her husband are both residing in England in the circumstances proved, whereas the respondent maintains that no relief would have been given because the parties are not domiciled in England, and no act of cruelty has been proved within the jurisdiction.

(1) L. R. 2 P. & M. 435, at p. 442.

In support of her contention the petitioner's counsel cited the judgments of James and Cotton L.JJ. in the case of *Niboyet* v. *Niboyet* (1), and certain passages from the above-mentioned judgment of Lord Watson. *Niboyet* v. *Niboyet* (1) was a case in which a marriage was solemnized at Gibraltar between a Frenchman and an Englishwoman, and the husband resided for several years in England, but, being a Consul for France, retained his domicil of origin. The wife presented a petition for a divorce, alleging adultery committed in England and desertion. The husband appeared under protest, and prayed to be dismissed. It was held, reversing the decision of Sir R. Phillimore, by James and Cotton L.JJ., Brett L.J. dissenting, that the Court had jurisdiction to grant a divorce. I have already pointed out that this decision is virtually overruled; but Lord Watson, in *Le Mesurier* v. *Le Mesurier* (2) said "The main reason assigned for their decision by the learned judges of the majority was that, before the Act of 1857 became law, the petitioner would have been entitled to sue her husband in the Bishop's Court, although he was not domiciled in England, and to ask either for restitution of conjugal rights or for a divorce a mensa et thoro, and in either case for proper alimony; and consequently that, after the Act of 1857 passed, jurisdiction in divorce might be exercised in the same circumstances. There appears to their Lordships to be an obvious fallacy in that reasoning. It is not doubtful that there may be residence without domicil, sufficient to sustain a suit for restitution of conjugal rights, for separation or for aliment, but it does not follow that such residence must also give jurisdiction to dissolve the marriage. Their Lordships cannot construe s. 27 of the Act of 1857 as giving the English Court jurisdiction in all cases where any other matrimonial suit would previously have been entertained in the Bishop's Court." (3) The reasons given by James L.J. for holding the wife entitled to sue for a divorce a mensa et thoro in the Bishop's Court fully appear at pp. 4–6 of the report; but his observations appear to me to be limited to

(1) 4 P. D. 1. (2) [1895] A. C. 517.
(3) [1895] A. C. at p. 531.

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the case of the parties being resident though not domiciled in a matrimonial home within the jurisdiction, and a matrimonial offence being committed during such residence either within or outside the jurisdiction. Cotton L.J. proceeded on very much the same grounds, except that he does not seem to include the case of offences committed outside the jurisdiction. Lord Esher, who differed from the other Lords Justices, was of opinion that the domicil of the husband in England at the institution of the suit is the fact which gives jurisdiction to the English Divorce Court to decree divorce, and that the same rule applies to suits for judicial separation and to suits for the restitution of conjugal rights. This case cannot, therefore, be considered a distinct authority in the petitioner's favour; but her counsel, in addition to the last-quoted passage from Lord Watson's judgment, placed reliance on the following passage from the same judgment: "No authority can have a material bearing upon that point" (namely, whether the Courts of a colony have jurisdiction to dissolve a marriage contracted in England by British subjects who, though resident within the forum, still retain their English domicil,) "which does not relate to the dissolution of marriage; because there are unquestionably other remedies for matrimonial misconduct, short of dissolution, which, according to the rules of the jus gentium, may be administered by the Courts of the country in which spouses, domiciled elsewhere, are for the time resident. If, for instance, a husband deserts his wife, although their residence be of a temporary character, these Courts may compel him to aliment her; and in cases where the residence is of a more permanent character, and the husband treats his wife with such a degree of cruelty as to render her continuance in his society intolerable, the weight of opinion among international jurists, and the general practice, is to the effect that the Courts of the residence are warranted in giving the remedy of judicial separation, without reference to the domicil of the parties. But the considerations which justify the Courts of the residence in administering remedies for the protection of mutual rights incidental to marriage, which do not involve disruption of the marriage bond, have little or no application to proceedings

taken for the purpose of putting an end to the marriage and remanding the spouses to the condition of single persons." (1) It is to be observed that the cases referred to in this passage, in which the remedy of judicial separation may be given, are the same as those contemplated by James L.J., and do not necessarily include the present case, where the parties, though within the jurisdiction at the commencement of the suit, had no joint matrimonial home of any kind in this country. Counsel for the petitioner did not cite the works of any jurists who may have been referred to by Lord Watson. The published works of several eminent writers which I have consulted shew that doubt has been expressed upon the question which Lord Watson does not consider doubtful.

Most of the writers on private international law and the conflict of laws treat at length the question of the laws and principles upon which the dissolubility or indissolubility of marriage depends, but there is little to be found in the works of such writers on the question of jurisdiction to decree the separation or divorce a mensa et thoro of married persons who are residing but not domiciled in the country of the forum. The reasons are not far to seek. Dissolution of marriage has been permitted in some States and not in others, and has been allowed in some States on grounds different from those on which it could be obtained in others. There has been want of unanimity as to the forum which ought to take cognisance of the question of divorce, and as to the laws to be applied and the recognition to be accorded in one State to a decree of dissolution of marriage pronounced in another. Persons domiciled in a country where divorce has not been permitted or only permitted on certain grounds, have, in order to obtain divorces, temporarily resided or assumed domicil in another country where divorce has been permitted or more easily obtained than in the former country. Hence numerous difficult and varied questions have arisen and been discussed in reported cases and by different jurists upon the question of dissolution of marriage. But in practice suits for judicial separation or divorce a mensa et thoro and restitution of conjugal rights do not appear to

(1) [1895] A. C. 517, at pp. 526, 527.

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have given rise to similar difficulties, and, therefore, cases and discussions as to jurisdiction in these suits are not often met with. Such suits generally occur before the tribunals of the country in which the parties are in fact domiciled, and a case like that before me was not so likely to occur in former days as at the present time, when large numbers of people are to be found residing for more or less lengthy periods away from the place of their domicil.

Sir R. Phillimore, in his work on International Law, ed. 1889, vol. iv. p. 382, et seq., does not enter upon the question of the validity of a decree of divorce a mensa et thoro by the Court of a State in which the parties are living but not domiciled, though he makes mention of the case of *Connelly* v. *Connelly* (1), where, in answer to a suit in the Arches Court of Canterbury for restitution of conjugal rights, a wife relied for her answer partly on a decree of separation between the parties at Rome, and, after her plea had been rejected by the Court of Arches, the Privy Council allowed her to amend her plea by stating that she and her husband were domiciled at Rome at the time when the alleged sentence was passed, and that by the law of their American domicil (the lex loci contractus) that sentence would be held valid, but gave no opinion as to what the effect of such further pleading might be.

Burge, in his Commentaries on Colonial and Foreign Laws, ed. 1838, chap. 8, s. 2, p. 668 et seq., confines his inquiry to the conflict between the law of the one country, which treats marriage as indissoluble, and that of the other, which authorizes its dissolution by judicial sentence. He states that "the obligatory effect of a sentence of separation a mensa et thoro by a foreign tribunal will be the subject of inquiry" by him in a subsequent part of his work, "when the nature and effect of foreign judgments and sentences are considered," but I cannot find that he reverts to the subject. He observes, however (p. 669), that "generally the law of the actual domicil of the parties is admitted to be competent to decree their separation a mensa et thoro."

Bishop, in his Commentaries on the Law of Marriage and

(1) (1851) 7 Moo. P. C. 438.

Divorce (Boston, ed. 1881), s. 158, discusses the jurisdiction of the Ecclesiastical Courts in England, and shews how the bishop's jurisdiction did not extend beyond his diocese, and concludes with this passage: "Besides the English Courts had no authority to dissolve valid marriages, and it may be doubted whether a suit for separation from bed and board involves a question of status within the principle we are considering. If it does, still no one would seek such a divorce under circumstances to give the decree no personal effect upon the defendant."

Dr. Bar considers fully the subject of jurisdiction in divorce in his Theory and Practice of Private International Law, translated by Gillespie, ed. 1892. At p. 381 he says: "The result in practice will probably be found to coincide pretty much with the doctrine of the text, because wives claiming aliment or demanding protection will resort to the forum of the place of residence, while these Courts will not determine any question of rights so as permanently to affect the marriage relations, unless they have jurisdiction ratione domicilii." And, again, at p. 384, in the notes: "The Court of the domicil or even of the place of residence in cases of necessity are competent to lay down provisional rules, e.g., to regulate a provisional separation, to protect the wife from cruelty, or to make temporary provision for her aliment, to restore for a time at the husband's instance the domicile conjugal. French practice recognizes this."

Professor Westlake (Private International Law, ed. 1890) states that "the jurisdiction of the English Court to decree judicial separation depends on the same circumstances as its jurisdiction to grant a divorce" (s. 47); but he adds "If the matter be considered on the ground of social rather than of legal principle, a doubt may be suggested whether it is necessary to identify the jurisdiction for judicial separation with that for divorce. The former decree leaves the parties man and wife, but gives to the injured party a protection against some of the consequences of that status; and it may therefore be reasonable to allow its benefit to be enjoyed within the territory by those who are resident in it, even though the Court of their country or domicil should alone be held competent to dissolve the tie of marriage between them." He further appears to

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consider that the English Court has jurisdiction to decree restitution of conjugal rights where both parties are in England at the time of the commencement of the action (s. 48).

Dr. Fraser, in his Treatise on Husband and Wife according to the Law of Scotland, 2nd ed. 1878, p. 1,294, under the title of Actions of Separation and Aliment, points out that "different considerations come into play when the object is not permanently to affect the status of parties, but to obtain immediate protection from cruel treatment, or the means of daily subsistence," and the hardship which would arise if the rule were established that "jurisdiction in actions of separation only exists in the forum of the husband's domicil."

I do not find that the point in question is expressly dealt with in Foote's Private International Jurisprudence, ed. 1890, Dicey's Conflict of Laws, ed. 1896, Eversley on The Law of The Domestic Relations, 1885, Story's Conflict of Laws, ed. 1872, or Kent's Commentaries, ed. 1873. But in Wharton's Conflict of Laws, ed. 1881, s. 210, p. 294, there is the following passage: "Cruelty, or other misconduct, gives jurisdiction for police purposes to the courts of the place where such misconduct takes place and where the offender may be cited though he be not there domiciled; but without such domicil the Court, while it will interpose for the protection of the injured party, and for a provisional separation, can grant no permanent dissolution of the marriage tie." And in a note on the same page it is stated that there is much doubt in France whether the Courts have jurisdiction to decree a "séparation de corps" between foreigners not domiciled but resident in France, but that this jurisdiction is maintained in Switzerland.

I conclude from the writers to whom I have referred that most of them are disposed to consider that the Courts of the country in which the parties are living, though not domiciled, ought to have the right in a matrimonial suit to afford protection to an injured party from the cruelty of the other party.

Lord Hannen may possibly have had such a case in his mind when, in giving judgment in *Firebrace* v. *Firebrace* (1), he

(1) (1878) 4 P. D. 63.

said, "The domicil of the wife is that of the husband, and her remedy for matrimonial wrongs must be usually sought in the place of that domicil"; but added "It is not, however, inconsistent with this principle that a wife should be allowed in some cases to obtain relief against her husband in the tribunal of the country in which she is resident, though not domiciled." (1) That was a suit for restitution of conjugal rights where the respondent, the husband, who was domiciled in Australia, had left England before the institution of the suit, and it was held that the Court had not jurisdiction over him after he left this country, and that the suit could not be maintained. Had he remained in England it would seem from the cases of *Newton* v. *Newton* (2) and *Thornton* v. *Thornton* (3) that the suit could have been maintained. In the recent case of *Christian* v. *Christian* (4), the President said that a suit for judicial separation may be founded upon matrimonial residence only as distinguished by our law from domicil.

Having considered sufficiently for the purposes of the case the opinions of the jurists above mentioned, it is necessary that I should revert to the 22nd section of the Act of 1857, which requires the Court in such a suit as the present to act conformably to the principles and rules on which the Ecclesiastical Courts had theretofore acted and given relief.

There are several works which deal more particularly with the jurisdiction and mode of proceeding in the Ecclesiastical Courts—e.g., Burn's Ecclesiastical Law, ed. 1842, Rogers's Ecclesiastical Law, ed. 1849, Shelford's Law of Marriage and Divorce, ed. 1841, and older works, such as Godolphin's Abridgment; but I cannot trace in them any statement upon the precise point in question, and the principles to govern it must be deduced from the general principles and practice of the Courts. These are stated in general terms so far as concerns the matter under consideration by James L.J., in his judgment above referred to (5), where the jurisdiction of the Court Christian is considered, and it is pointed out that the

(1) 4 P. D. at p. 67.
(2) (1885) 11 P. D. 11.
(3) (1886) 11 P. D. 176.
(4) (1897) 78 L. T. 86.
(5) See *Niboyet* v. *Niboyet*, 4 P. D. 1, at p. 3.

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Church and its jurisdiction had nothing to do with the original nationality or acquired domicil of the parties, that residence as distinct from casual presence on a visit or in itinere was an important element, but that residence had no connection with or little analogy to the question of a person's domicil.

In my opinion, if the parties had a matrimonial home, but were not domiciled within the jurisdiction of an Ecclesiastical Court, that Court would have interfered, if the parties were within the jurisdiction at the commencement of the suit, to protect the injured party against the other party in respect of the adultery or cruelty of the latter, and I can find no authority for the suggestion made by the respondent's counsel that such interference would be limited to cases where the offence complained of was committed within the jurisdiction. In *Warrender* v. *Warrender* (1) Lord Lyndhurst said: "The law, either in this country or in Scotland, makes no distinction in respect of the place of the commission of the offence." Although the Ecclesiastical Courts could not extinguish the mutual obligations of husband and wife, they, acting pro salute animæ, suspended these obligations in order to protect and relieve the injured party. It could make no difference, where the parties were residing within the jurisdiction, that the necessity for protection and relief arose in consequence of adultery committed by the wrongdoer while temporarily outside the jurisdiction, or of cruelty committed while the parties were temporarily outside the jurisdiction, and the apprehension of further acts of cruelty remained. If the parties were within the jurisdiction, and the necessities of the case demanded that one of them should be protected against a matrimonial wrong done by the other of which the Courts would take cognizance, I cannot doubt that the Courts would have interfered. The case of *Manning* v. *Manning* (2), which was relied upon by the respondent's counsel, is no authority against this view, because in that case the respondent was not within the jurisdiction of the Court, and the petitioner was held not to be a bonâ fide resident in England. If the respondent's contention be correct no decree of judicial separation could be made, even in cases like *Niboyet*

(1) (1835) 2 Cl. & F. 488, at p. 562. (2) (1871) L. R. 2 P. & M. 223.

v. *Niboyet* (1), where the parties, though not domiciled, were resident for years in this country.

Then, does the present case fall within the principles and rules upon which the Courts have acted? I think it does. The wife, an Englishwoman, whose domicil of origin was English, and who has resided at times in England with her husband, is forced, by the cruelty committed in Italy by her husband, a domiciled Australian, to seek the protection of her parents in England. Though legally domiciled in Australia, as a matter of fact she has been forced to separate herself from her husband and establish herself in a home of her own in this country. She and her husband are both within the jurisdiction. She has been required to return with her children to her husband, and is afraid to do so owing to her apprehension of a repetition of the acts of cruelty which have been committed against her while they were living together abroad. It is against the repetition of apprehended acts of cruelty that the Court grants its protection, and, unless the Court interferes, there is nothing to prevent the husband from forcing himself upon his wife and placing her in a position in which she may be subjected to further acts of cruelty. The status of married persons within the country is recognised. Performance of the duties arising from the marriage tie should be required, and protection afforded against an abuse of the position resulting from that tie where necessary. Police protection is an inadequate remedy.

It may be objected that a decree of judicial separation affects the status of the parties, and that a change of status ought on principle only to be effected by the Courts of the domicil. But the relief is to be given on principles and rules which, in the opinion of the Court, shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts gave relief. According to those principles and rules cruelty and adultery were grounds for a sentence of divorce a mensa et thoro which did not dissolve the marriage, but merely suspended either for a time or without limitation of time some of the obligations of the parties. The sentence commonly separated the parties until they should be reconciled to each other. The

(1) 4 P. D. 1.

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relation of marriage still subsisted, and the wife remained a feme covert. A woman divorced by the Court a mensa et thoro and living separate and apart from her husband could not be sued as a feme sole (see *Lewis* v. *Lee*. (1)) The effect of the sentence was to leave the legal status of the parties unchanged. Although a sentence of judicial separation is to have the effect of a divorce a mensa et thoro under the old law (s. 16 of the Act of 1857), and also the further effect of placing the wife in the position of a feme sole, with respect to property which she may acquire, or which may come to or devolve upon her, from the date of the sentence and whilst the separation continues, and also for the purposes of contract and wrongs and injuries and suing and being sued during that period (ss. 25 and 26 of the Act of 1857); yet as the relief to be given now is to be given according to the principles and rules in force in the Ecclesiastical Courts, I am of opinion that the effect of the said ss. 25 and 26, if they affect a wife's status within the meaning of the term as applied to the principles under consideration, which is doubtful, is not to deprive the Court of the power to grant relief in cases where it would have been granted by the Ecclesiastical Courts.

It may be further objected that, as domicil is considered a test of jurisdiction in cases of dissolution of marriage, in order that the decree may be recognised in countries other than that of the domicil, for the same reason a similar test should be applied in cases of judicial separation. But the reasons which apply in the one case are not applicable to the other; and even if the principle should be established that the Courts of the country of the domicil of the parties are the only Courts which can pronounce a decree of judicial separation which ought to be recognised in other countries, in my opinion, no valid reason can be urged against the Courts of a country, in which a husband and wife are actually living, pronouncing a decree which will protect the one against the other so long as they remain within the jurisdiction.

In the present case the wife's domicil is legally in Australia, but, as a matter of fact, she has justifiably separated herself

(1) (1824) 3 B. & C. 291.

from her husband and made her home in England, and it is in England that she now requires protection. He has come here and subjected himself to the jurisdiction of the Courts of this country. Could anything be more unreasonable than for this Court to hold that it has no power to suspend the wife's obligation to live with her husband while in this country, and leave her to proceed in the Courts in Australia to protect herself against her husband in England? It may, I think, be safely laid down that the Ecclesiastical Courts would formerly, and this Court will now, interfere to protect a wife against the cruelty of her husband, both being within the jurisdiction, when the necessities of the case require such intervention. I therefore hold that this Court has jurisdiction to entertain this suit, and I pronounce a decree of judicial separation in favour of the petitioner with costs. Having held that the Court has jurisdiction to entertain the suit, I think it follows that the Court has jurisdiction under the powers expressly conferred upon it by the 35th section of the said Act of 1857, and the 4th section of the Matrimonial Causes Act, 1859, to make provision for the custody of the children of the marriage; and, as I have heard the case, it is probably more convenient that I should dispose of this matter rather than leave it for further contest in the Chancery proceedings. I will hear any application relating to the children in chambers.

Solicitors: *Jackson & Prince; Negus.*

H. D. W.

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Admiralty—Practice—Jurisdiction—County Court—Service of Summons—Agent—County Courts Admiralty Jurisdiction Act, 1868 (31 *&* 32 *Vict. c.* 71), *s.* 21, *sub-s.* 2.

By the County Courts Admiralty Jurisdiction Act, 1868, s. 21, "Proceedings in an Admiralty cause shall be commenced—(2.) in the county court having Admiralty jurisdiction in the district of which the owner of the vessel or property to which the cause relates, or his agent in England, resides. . . . ."

In an action in personam instituted in the City of London Court by the plaintiffs, the owners of a barge damaged by collision with the defendant's steamship within the jurisdiction, the summons described the defendant as "George Smith, of 75, Bothwell Street, Glasgow, the owner of the steamship or vessel *City of Agra*, whose agents in England are Messrs. Montgomerie & Workman, of 36, Gracechurch Street, E.C., within the jurisdiction of this Court." The summons was served on a member of the firm of Montgomerie & Workman; but the *City of Agra* had been lost before the commencement of the action:—

Held, by Gorell Barnes J., that the service of the summons must be set aside, as "agent in England" means a person acting for another person in relation to the vessel or property proceeded against at the time the service of the process is effected, and, at that time, the agency had ceased.

The cases of *The County of Durham*, [1891] P. 1, and *Pugsley* v. *Ropkins*, [1892] 2 Q. B. 184, explained.

Motion in prohibition and for an injunction.

By consent the motion was treated as if it were an appeal, by the defendant, to a Divisional Court from the refusal of the judge of the City of London Court to set aside, for want of jurisdiction, the service of the summons in an action of damage by collision.

The question turned on the meaning of the words "agent in England" in s. 21, sub-s. 2, of the County Courts Admiralty Jurisdiction Act, 1868. (1)

(1) 31 & 32 Vict. c. 71, s. 21: "Proceedings in an Admiralty cause shall be commenced—

"(1.) In the county court having Admiralty jurisdiction within the district of which the vessel or property to which the cause relates is at the commencement of the proceedings.

"(2.) If the foregoing rule be not

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The facts were briefly as follows :—

On January 6, 1897, a collision occurred in the Victoria Docks, within the Admiralty jurisdiction of the City of London Court, between the dumb barge *Colnmouth*, owned by the London and Tilbury Lighterage, Contracting, and Dredging Company, Limited, of 50, Mark Lane, in the City of London, and the steamship *City of Agra*, owned by George Smith, William Service Workman, and Hugh Brown, all of Glasgow, Scotland.

On February 2, 1897, the *City of Agra* was totally lost.

On June 7, 1898, a summons in an action in personam by the plaintiffs, the owners of the barge and the bailees of her cargo, for 250*l.* damages for collision issued out of the City of London Court (Admiralty jurisdiction), and was served on June 9 upon W. E. Montgomerie, of the firm of Montgomerie & Workman, at their office No. 36, Gracechurch Street, in the City of London. The defendant was described as "George Smith, of 75, Bothwell Street, Glasgow, the owner of the steamship or vessel *City of Agra*, whose agents in England are Messrs. Montgomerie & Workman, of 36, Gracechurch Street, E.C., within the jurisdiction of this Court."

The defendant entered an appearance under protest, and in support of the present motion filed an affidavit, in which W. E. Montgomerie stated that his "firm act as the agents in London for the City line of steamers running from various British ports to certain Indian ports, and of which line Messrs. George Smith & Sons of Glasgow are the managers." "The *City of Agra* was at the time of the collision in question running upon the said line," but since the date of her loss his "firm have not acted in any way as agents for the said steamer or her owners save in so far as some of the owners may be interested in other steamers still running upon the said line."

At the date of the commencement of the action the plaintiffs'

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applicable, then in the county court having Admiralty jurisdiction in the district of which the owner of the vessel or property to which the cause relates, or his agent in England, resides. . . . ."

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barge was lying in the Victoria Docks within the jurisdiction of the City of London Court.

Simey and *Alexander D. Bateson*, in support of the motion.

Lauriston Batten, contra.

The arguments of counsel fully appear from the judgment, and the cases cited are mentioned therein.

Cur. adv. vult.

July 7. GORELL BARNES J. In this case the learned judge of the City of London Court intimated to the parties that it would be better for the question of jurisdiction to be decided in the High Court; and, accordingly, counsel for the defendant moved before me by way of prohibition and injunction; but, by consent, the motion has been dealt with by me as an application by the defendant to set aside the service of the summons.

On behalf of the defendant it is contended that the plaintiffs are attempting to sue him, a Scotchman residing in Scotland, for damages resulting from a collision which happened in the jurisdiction, but in respect of which it is alleged he can only be sued personally in Scotland.

If the proceedings in this action were in rem and the res existed, and was within the jurisdiction, then the place of the defendant's residence would be immaterial. But the proceedings are in personam because the res has been lost, and it is, therefore, difficult to see how any statutes giving jurisdiction to the county courts in England could affect a defendant who is a foreigner in these courts, and who, as far as England is concerned, resides abroad.

Counsel for the plaintiffs contend that, in accordance with certain decisions on the County Courts Acts, the service was properly made under sub-s. 2 of s. 21 of the County Courts Admiralty Jurisdiction Act, 1868. [The learned judge read the section, the material portion of which has been already set out, and continued:—]

Now, I have no doubt that at the time when the provisions contained in that section were framed they were intended to

relate to the defendant's vessel or property. The jurisdiction which the Act gives to the county courts, within their several districts, includes salvage within certain limits, towage, necessaries, or wages within certain limits; claims for damage to cargo or damage by collision within certain limits; and in the further case, where the parties agree to the jurisdiction. I think it is quite clear, under that Act, as it originally stood, that the proceedings were contemplated as being always against a defendant's vessel or property, or the defendant who owned a vessel or property. In the absence of the qualification, to which I will presently refer, I have no hesitation in concluding that the words "vessel or property to which the cause relates" mean vessel or property against which the proceedings are taken. It is the ordinary language used in this Court, and was, no doubt, adopted in framing this Act. That that is so, I think, is also made tolerably clear from a consideration of other sections of the Act. For instance, s. 22 provides that "In an Admiralty cause in a county court, if evidence be given to the satisfaction of the judge, or in his absence the registrar of the court, that it is probable that the vessel or property to which the cause relates will be removed out of the jurisdiction of the Court before the plaintiff's claim is satisfied, it shall be lawful for the said judge, or in his absence for the registrar, to issue a warrant for the arrest and detention of the said vessel or property," clearly shewing that by "the vessel or property to which the cause relates" is meant the vessel or property proceeded against. So also in s. 32 similar words are used with reference to the power to transfer to the High Court the proceedings for the sale of the "vessel or property to which the cause relates."

In 1869, however, the County Courts Admiralty Jurisdiction Act Amendment Act of that year made certain changes. It extended the jurisdiction of the county courts appointed to have Admiralty jurisdiction to claims arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship, and also as to any claim in tort in respect of goods carried in any ship within certain limits. It also extended the jurisdiction to claims for damage to ships,

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whether by collision or otherwise, within certain limits. The consequence of adding these other matters to the jurisdiction of the county court is that there may be cases in which no proceeding in rem can be taken because the defendants are not necessarily the owners of the ship or property, and where, therefore, it may be necessary to proceed in personam, but no new express procedure was introduced in respect of the Act of 1869. The two Acts are to be read together; and the result has been that in some cases the Courts have had to make the best they can of these two Acts. In fact, it is not too much to say of the legislation as it at present stands with regard to the Admiralty jurisdiction of county courts, that it is in a state of confusion, and nearly every time that any question as to jurisdiction and as to procedure arises, the Court is placed in extreme difficulty in consequence of these two Acts not being carefully interwoven, and also because the County Courts Act of 1888 makes matters still more embarrassing. It is to be hoped that before long these statutes will be put into a shape which will obviate the difficulty now arising in construing them, and also save the expense to the parties resulting from not having a more simple procedure to deal with.

The first case which was referred to before me was *The County of Durham* (1), in which the plaintiffs, the owners of a steamship, commenced an action in personam in the county court within the jurisdiction of which their vessel then was against the defendants, the charterers, for breach of an alleged warranty in the charterparty as to the depth of water at the defendants' wharf, whereby the plaintiffs' vessel sustained damage whilst at the wharf, which was within the jurisdiction of another county court. It was held that as the two Acts of 1868 and 1869 are, by s. 1 of the latter Act, to be read as one, the language of ss. 3 and 21 of the Act of 1868 is thereby extended so as to include the plaintiffs' vessel in an action instituted under s. 2 of the Act of 1869, and that consequently the county court in which the action had been commenced had jurisdiction. I understand the decision in that case to be that although sub-s. 1 of s. 21 was originally meant to apply to the

(1) [1891] P. 1.

vessel or property to which the cause relates, namely, to the defendants' vessel or property, it was necessary, and was not doing violence to the language of the two statutes taken together, to apply that sub-section to the vessel or property belonging to the plaintiffs, which was the only vessel or property in question, and therefore it might be read as if the cause related to that vessel.

The next case referred to was that of *Pugsley* v. *Ropkins*. (1) There an Admiralty action was commenced by shipowners in the county court having Admiralty jurisdiction in the district in which they resided, which was Monmouthshire, against the indorsees of a bill of lading, who were merchants carrying on business at Wisbeach, in Cambridgeshire. The bill of lading incorporated the terms of the charterparty, and the action was to recover 40*l.* as demurrage for the detention of the ship at the port of discharge, which was Wisbeach. At the commencement of the action the ship was at sea, and the cargo to which the bill of lading related was not in the district of the county court in which the action was commenced. It was held that the action was rightly commenced in the district in which the shipowners resided, for, the vessel being at sea, sub-s. 1 of s. 21 of the Act of 1868 was inapplicable, and sub-s. 2 applied. I understand the effect of that decision to be that sub-s. 1 of s. 21 would have been applicable according to the case of *The County of Durham* (2), although the vessel was the vessel of the plaintiffs, if that vessel had been within the jurisdiction of the Monmouthshire County Court at the time of the action being brought, because, there being no other vessel in question, the vessel or property to which the cause relates might be treated as the vessel or property of the plaintiffs; but as she was at sea, and therefore not within the jurisdiction of the Court, that section was inapplicable, and therefore sub-s. 2 might be applied because the plaintiffs might be treated as the owners of the vessel or property to which the cause relates, and as they were within the district of the county court of Monmouthshire, they might in that county court sue the persons who were resident in Wisbeach. I confess to having

(1) [1892] 2 Q. B. 184. (2) [1891] P. 1.

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considerable difficulty in following that decision, but, as it is a decision of a Divisional Court and of the Court of Appeal, it is binding, though it seems to me that sub-s. 2 of s. 21 was never meant to apply to such a case.

The only other case necessary to refer to is that of *The Hero* (1), which, I think, merely shews that under s. 74 of the County Courts Act, 1888—as the language of that section is general in its terms, and therefore includes the defendants in an Admiralty action who at the time of the commencement of an action carried on business within the district in which the action was brought—the action may be maintained against persons carrying on business within the district of the county court by virtue of the provisions of that section. That is not applicable to the present case.

It will be seen that none of these decisions touch the case of a person who does not reside within the jurisdiction of any court in this country, though if the case of *Pugsley* v. *Ropkins* (2) is carried out to its legitimate conclusion, then, because the plaintiffs are within the district, the defendant might be served although he is abroad. I cannot think that was intended, or that these cases have any application to that now before me. The result appears to me to be that, in regard to sub-s. 1 of s. 21, in collision cases the vessel or property to which the cause relates is the defendant's ship, and that that sub-section is not applicable to the present case because the ship is lost; that the word "property" would apply to cases of salvage of cargo, for instance, where something besides the vessel is concerned; but that if that sub-section, according to either of the cases to which I have referred, may in a case like this, where the vessel has been lost, be treated as applicable where the plaintiffs' vessel or property is within the jurisdiction, and that vessel or property may be termed the vessel or property to which the cause relates, still, in this case, as the defendant is out of the jurisdiction he cannot be served, for he can only be served in personam, and there is no process or provision by which anybody else can be served for him. Sub-s. 1, therefore, is inapplicable.

(1) [1891] P. 294. (2) [1892] 2 Q. B. 184.

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As to sub-s. 2, it seems to me that, in a collision case, the owner of the vessel or property to which the cause relates refers to a defendant, and the cause relates to a defendant ship. If it does, then the present suit would be one which was capable of being instituted against an owner of the *City of Agra*, being the ship to which the cause relates, or his agent in England in the district in which either the one or the other resides. But, then, the defendant does not reside in the district of the City of London Court. He resides in Scotland, and at the time of the issue of the process and the service of the process in this case he had no agent relating to this ship residing in the district, because the agency of Messrs. Montgomerie & Workman, so far as this ship was concerned, had ceased by her loss. It cannot be contended successfully that the agent referred to in that section is a person who is acting as agent for the defendant in other matters than the ship in question. It would lead to extraordinary results if that were so, because a man might have a number of agents for very different purposes, quite unconnected with the ship, and it cannot be intended that those persons should be included in the word "agent." I think "agent in England" means a person acting for another person in relation to the vessel or property proceeded against at the time the service of the process was effected. In this case there was no such person, and I regard the agency as having entirely ceased.

Again, if sub-s. 2 can be treated so that the owner of the vessel or property to which the cause relates is the plaintiff, which is the way the matter was looked at in the case of *Pugsley* v. *Ropkins* (1), then the owners of the vessel or property to which the cause relates, or their agent, are the plaintiffs or their agents in England, and the only means of getting at the defendant would be to serve him personally; but as he cannot be served personally within the jurisdiction, and there is on this construction of sub-s. 2 no provision for any agent being served, that sub-section becomes inapplicable.

The only other matter to refer to is rule 16 (2), made under the

(1) [1892] 2 Q. B. 184.

(2) County Court Rules in Admiralty Actions, 1892; amended 1895 Order XXXIX. B., r. 81.

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Act of 1868, with reference to service on an agent. That does not carry the case any further, because there was no agent at the time.

For these reasons it seems to me that the process in this case cannot be enforced against the defendant. I am quite clear that in principle it ought not to be, because although, if a foreigner has property here, it is quite right that proceedings in rem should be taken against that property, yet if he is not personally in the jurisdiction, and an action in personam is brought, he is not subject to the jurisdiction, and ought not to be made subject to it in this country. I therefore direct that the service of the process be set aside with costs here and below.

Solicitors for plaintiffs: *William Hurd & Son.*
Solicitors for defendant: *William A. Crump & Son.*

T. L. M.

1898

June 10; *July* 7.

THE FULHAM.

Admiralty—Salvage—Jurisdiction—Receiver of Wreck—Detention of Property—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 546, 552.

By s. 546 of the Merchant Shipping Act, 1894, "Where any vessel is . . . . in distress at any place on or near the coasts of the United Kingdom . . . . and services are rendered by any person in assisting that vessel . . . . there shall be payable to the salvor by the owner of the vessel . . . . a reasonable amount of salvage to be determined in case of dispute in manner hereinafter mentioned."

By s. 552, "Where salvage is due to any person under this Act, the receiver shall—(*a*) if the salvage is due in respect of services rendered in assisting any vessel or in saving life therefrom . . . . detain the vessel . . . . until payment is made for salvage . . . ."

A British steamship, belonging to the plaintiffs, with cargo from and to a Continental port, was in the English Channel, in distress, for want of fuel, twenty miles off the coast. A British steam-tug towed her into Plymouth, and, at the request of the master of the tug, the defendant, receiver of wreck at that port, detained the plaintiffs' vessel two days pending the production of satisfactory bail to answer a claim for salvage.

In an action for damages for the illegal arrest of the vessel:—

Held, by Gorell Barnes J., that the defendant was entitled to judgment, as the words in s. 552, "salvage . . . . due under this Act," are not

confined to salvage expressly made payable under the Act, but include salvage which may be awarded by the Courts mentioned in the Act whose jurisdiction is conferred or recognised by it.

Semble, that the words "near the coasts of the United Kingdom" in s. 546 are restricted to the territorial limit.

ACTION for 60*l.* damages for two days' alleged illegal detention of a steamship.

The plaintiffs were the Britain Steamship Company, Limited, owners of the steamship *Fulham*. The defendant was Thomas Hudson, receiver of wreck and collector of customs at the port of Plymouth.

The facts were shortly as follows:—

On December 14, 1897, the British steamship *Fulham*, of the port of London, whilst on a voyage from Sulina to Dunkirk with a cargo of barley, ran short of fuel, and, on December 16, when in the English Channel, about twenty miles from Plymouth, she was taken in tow by the steam-tug *Flying Buzzard*, and on the same day brought into Plymouth.

At the request of the master of the *Flying Buzzard*, the defendant, acting under the authority of s. 552 of the Merchant Shipping Act, 1894 (1), detained the *Fulham* by placing a man on board of her; and it was alleged that on December 18 the defendant refused to accept bail tendered by the agents of the plaintiffs, and also refused to accept an undertaking for bail subsequently offered by the solicitors of the plaintiffs.

On December 20 the owners, master, and crew of the *Flying*

(1) 57 & 58 Vict. c. 60, s. 552: "(1.) Where salvage is due to any person under this Act the receiver shall—

"(*a*) if the salvage is due in respect of services rendered in assisting any vessel or in saving life therefrom, or in saving the cargo or apparel thereof, detain the vessel and cargo or apparel; and

"(*b*) if the salvage is due in respect of the saving of any wreck, and the wreck is not sold as unclaimed under the Act, detain the wreck.

"(2.) Subject as hereinafter mentioned, the receiver shall detain the vessel and the cargo and apparel or the wreck (hereinafter referred to as detained property) until payment is made for salvage, or process is issued for the arrest or detention thereof by some competent court.

"(3.) A receiver may release any detained property if security is given to his satisfaction. . . ."

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Buzzard issued a writ in an action in the Probate, Divorce, and Admiralty Division (Admiralty) of the High Court of Justice against the owners of the *Fulham*, her cargo and freight; and on the same day security was given by the plaintiffs to the satisfaction of the defendant, who thereupon released the vessel.

It was contended by the plaintiffs in the present action :—

First, that the arrest and detention of the *Fulham* by the defendant was illegal on the ground that he had no jurisdiction, under s. 552 of the Act, as the vessel was in distress twenty miles off the coast and, therefore, not within s. 546 of the Act (1);

Secondly, that the defendant had improperly refused to accept bail.

With regard to the question of fact involved in the second point, the learned judge intimated, during the hearing, that the charge had not been substantiated, and in the course of his judgment referred to this matter in the following terms :—

"There was a further point made at the hearing before me, that the defendant on December 18 improperly refused to accept bail or the undertaking of the plaintiffs' solicitors to put in bail; but after hearing evidence on both sides on this point I decided that, assuming that the defendant had power to arrest and detain the vessel at all, he did not improperly detain her.

The plaintiffs' case was that their solicitors offered sureties or an undertaking to put in bail, and that the defendant improperly refused to accept either. The defendant stated that he required the sureties to justify, or the assent of the salvors to the sureties. The sureties did not justify, and the salvors' assent was not procured till the 20th, when the vessel

(1) 57 & 58 Vict. c. 60, s. 546: "Where any vessel is wrecked, stranded, or in distress at any place on or near the coasts of the United Kingdom or any tidal water within the limits of the United Kingdom, and services are rendered by any person in assisting that vessel or saving the cargo or apparel of that vessel or any part thereof, and where services are rendered by any person other than a receiver in saving any wreck, there shall be payable to the salvor by the owner of the vessel, cargo, apparel, or wreck, a reasonable amount of salvage to be determined in case of dispute in manner hereinafter mentioned."

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was released. I was of opinion that the defendant was entitled to act as he did. He was bound in the interests of the salvors to take the proper steps to satisfy himself that the security offered was adequate, and the usual course is to require the sureties to justify unless the salvors dispense with justification; and as soon as the salvors assented to the sureties he released the ship. Until then, security to the reasonable satisfaction of the defendant under s. 552, sub-s. 3, had not been given."

On the question of law involved in the first point:—

Robson, Q.C., and *J. A. Hamilton*, for the plaintiffs. The defendant had no power to detain the vessel. The duties of a receiver of wreck only arise, under s. 552 of the Merchant Shipping Act, 1894, in respect of salvage "due under the Act"; but the *Fulham* was not "in distress at any place on or near the coasts of the United Kingdom" within the meaning of s. 546, for she was twenty miles off the coast, and when she was brought within the territorial limit, that is, within three miles of the coast, she was no longer in distress. No doubt the wording of s. 546 is larger than that of the corresponding repealed section (458) of the Merchant Shipping Act, 1854; but that is only to get rid of the necessity for the vessel to be literally "on the shore": see *The Leda* (1), followed in *The Mac* (2); so that the vessel may now be anywhere in the vicinity of the shore within the three-mile limit.

[GORELL BARNES J. Why does not s. 544 apply, by which the salvage services may be rendered "wholly or in part within British waters."]

That section refers only to the saving of life, and was inserted to preserve the special statutory right to salvage for saving life which was given by previous Acts, and which does not exist at law. To found such a claim, however, the lives must have been really in danger. In the present case the danger was not sufficient to give rise to a claim for life salvage: see the *Cargo ex Woosung*. (3) The powers of the defendant, as receiver of

(1) (1856) Sw. 40, at p. 44.
(2) (1882) 7 P. D. 38, 126.
(3) (1875) 3 Asp. M. L. C. 50, reported on another point (1876) 1 P. D. 260.

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wreck, were only called into exercise in respect of the alleged assistance rendered by the plaintiffs to the vessel, her cargo and apparel.

Sir Robert B. Finlay, *S.-G.*, and *Sutton*, for the defendant. The *Fulham* was found under circumstances of danger twenty miles off the coast. She was salved by the *Flying Buzzard*, brought within the jurisdiction of the defendant as receiver of wreck, and his detention of the vessel was a lawful exercise of his powers in the interests of the salvors. The object of the Legislature is to provide an officer on the spot to do what, if he were not there, the salvor might himself do, if in possession of the salved property—that is, detain it until satisfactory security is forthcoming. See *Hartfort* v. *Jones*. (1)

The duties of a receiver of wreck, with reference to the detention of property liable for salvage, are not limited by the Merchant Shipping Act, 1894, in the way suggested. The sections referred to were never intended to cut down the powers of such an official in relation to salvage, but only to define the nature of some classes of salvage, and settle the mode of procedure. It is clear from s. 544, dealing with the case of salvage for saving life, that the word "salvage" is used in a general sense, and that the words "wholly or in part within British waters" are designedly inserted to get rid of a precise territorial limit even in the case of a foreign vessel. The contention of the plaintiffs is that the words "on or near the coasts of the United Kingdom" in s. 546 are equivalent to "within British waters," but they only mean that the vessel in distress must be near enough for the receiver to be able effectively to control the operations undertaken for her assistance without reference to a territorial limit. Similar words are advisedly used in s. 519, where it would not be reasonable to suppose that the question—whether the cargo or other articles separated from the vessel in distress are to be delivered to the receiver—would have to be settled by the consideration of the precise distance of the vessel from the coast. The extent of the powers of the receiver vary with the nature of the duties he is called upon to perform, as in the case of taking possession of

(1) (1699) 1 Ld. Raym. 393.

any wreck under s. 520, or selling under s. 522, or dealing with unclaimed wreck found in any part of Her Majesty's dominions under ss. 523 to 527. The powers of a receiver under s. 536, sub-s. 1, as to boarding a vessel in distress, are not limited by the words "on or near the coast," and the mode of procedure provided by s. 547 and following sections relates to salvage in general.

[Reference was made to the corresponding repealed sections of the Merchant Shipping Act, 1854, as reviewed in Williams and Bruce's Admiralty Practice, 2nd ed. p. 132.]

Robson, Q.C., in reply. Similar words to those in s. 546 are used in s. 511, where the receiver of wreck is required to "forthwith proceed there" and "take the command of all persons present." It is obvious that that would be impracticable unless the vessel in distress were "near" in the sense of "close to" the coast.

Cur. adv. vult.

July 7. GORELL BARNES J. This action is brought to recover damages from the defendant for the alleged illegal arrest and detention by him of the steamship *Fulham* at Plymouth.

The question to be decided depends entirely upon the construction of certain sections of the Merchant Shipping Act, 1894.

The plaintiffs' contention is that no salvage is due to any person under the Act, and that, therefore, the defendant had no right to detain the vessel.

The argument in support of this view is that, by the words in s. 552, "salvage due to any person under this act" is meant salvage made payable by ss. 544, 545, and 546; that the operation of the 552nd section is confined to such salvage, and that the salvage in question did not become payable under any of these sections.

Sects. 544 and 545, consolidating the sections of earlier Acts, make salvage payable for saving life in certain cases; and s. 546 is in these terms. [The learned judge read the section already set out, and continued:—]

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Apart from any question as to life salvage, the argument is that the *Fulham* was not in distress at any place "on or near the coasts of the United Kingdom," because the spot where she was found was twenty miles off the coast, and that such a spot is not within the meaning of the words "on or near the coasts."

The broad contention on the part of the defendant is that s. 552 is applicable not only to cases of salvage made payable by ss. 544, 545, and 546, but to all claims for salvage which may become payable by the decree of any Court having jurisdiction under the Act to determine disputes as to salvage.

The point is not free from doubt, though the doubt is less to my mind than it would have been had a similar point been raised under the Acts consolidated by the Act of 1894, which differs somewhat from the earlier Acts. On the whole I am of opinion that the defendant's contention is correct.

Under s. 547 of the Act of 1894 "disputes as to the amount of salvage, whether of life or property, and whether rendered within or without the United Kingdom," are, "if not settled by agreement, arbitration, or otherwise," to "be determined summarily as provided by the Act"—that is to say: in England in certain cases of consent or limited amounts by a county court having Admiralty jurisdiction, otherwise by the High Court in England. By s. 565 the High Court, and in Scotland the Court of Session, are, subject to the provisions of the Act, to "have jurisdiction to decide upon all claims whatsoever relating to salvage, whether the services in respect of which salvage is claimed were performed on the high seas or within the body of any county, or partly on the high seas and partly within the body of any county, and whether the wreck in respect of which salvage is claimed is found on the sea or on the land, or partly on the sea and partly on the land."

This section comprises the general jurisdiction which the Admiralty Court, now forming part of the High Court, exercised in salvage cases in respect of services on the high seas, and repeats the provisions of earlier statutes under which the jurisdiction of the Admiralty Court was extended to cases of salvage occurring within the body of a county.

The words in s. 552, "where salvage is due to any person under this Act," can hardly be construed literally, because whether a claim is made for salvage, the right to recover which is expressly conferred by the Act, or for salvage recoverable in Courts which have jurisdiction conferred upon them or confirmed to them by the Act, in either case the salvage award strictly speaking becomes due by the judgment of the Court. The term "due under this Act" appears to have been used as a general expression to cover any salvage which the Act contemplates being awarded by the Courts mentioned in it, the jurisdiction of which is conferred or recognised by it.

Moreover, since the Admiralty Court had jurisdiction within the body of a county, it is difficult to see in what cases a claim for salvage can be made under s. 546 which could not have been made without it; so that it seems unreasonable to limit s. 552 to one class of salvage, and not to extend its provisions to salvage claims generally for which process may be issued.

Two other points were taken by counsel for the defendant. The first was, that in any view of the case the defendant was entitled to detain the vessel because the services in question had been rendered partly in saving life.

The *Fulham* was in a position in which there would be some risk to the lives of those on board her. In the salvage suit against her and her cargo and freight, which was heard by me, an award of 900*l.* was given to the salvors for bringing her into Plymouth, and I found, on the advice of the Elder Brethren who assisted me, that there was risk of her going ashore and being lost. So that, as there was some risk of life, which would form an element in considering an award on a claim substantially made for saving the property, it cannot be said that the defendant had no jurisdiction whatever to detain the vessel. The plaintiffs' counsel made no effective answer to this point.

The other point was that the *Fulham* was in distress at a place "on or near the coasts of the United Kingdom," because she was, it was contended, "near" the coasts within the meaning of s. 546, and also because part of the assistance rendered to

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her was rendered within the three-mile limit as she was towed into Plymouth.

I cannot, however, read the words "near the coasts" as covering a place twenty miles off the coasts. The same language is to be found in other sections, particularly ss. 511 and 535; and I am of opinion that when the terms of these sections are considered the words "near the coasts" do not apply to such a case as that before me. Some limit must be placed on the term, and, having regard to all the sections dealing with wreck and salvage, as at present advised, I think the limit should be the territorial limit, though it is not necessary in this case to express a final opinion upon the point.

Nor is it necessary to decide whether s. 546 would apply because part of the service was rendered within the territorial limit. It is, in my opinion, extremely doubtful whether the section could be made to apply on this ground to the facts of this case.

I, however, uphold the defendant's main contention, and give judgment for him with costs.

Solicitors for plaintiffs: *Holman, Birdwood & Co.*

Solicitor for defendant: *Solicitor to the Board of Trade.*

T. L. M.

In the Goods of LEMAN.

1898
July 11.

Administration—Limited Administration—Will of Married Woman—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75)—*Probate Rules of April*, 1887.

Where, upon the death of a woman who had married before the commencement of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), it appeared that, before her marriage, she had acquired a mortgage debt, which her husband had not reduced into possession, and had since her marriage made a will purporting to dispose of all her real and personal property, the Court made a grant to her husband of administration to such of her property as she had no power to dispose of by will.

Application for a grant of limited administration.

Honor Leman, of Serrington St. Mary, in Somersetshire, died in February, 1898. By her will, made in October, 1889, she appointed her husband Thomas Leman and her daughter Mary Elizabeth Hosegood executors and trustees, and left to them all her real and personal estate in trust for the former for life, and after his death to the latter absolutely. In 1871, before her marriage, she had lent 170*l.* to one George Chapman on a mortgage of certain premises. Thomas Leman, whom she married in 1872, deposed that he had not reduced the security into possession, and had not authorized her to dispose of it by will. He applied for administration limited to the mortgage debt.

R. H. Pritchard, in support of the application. The title of the testatrix having accrued before the passing of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), she had no power to dispose of the security by will without her husband's consent. In consequence of the Probate Rules of 1887 (1) he

(1) By the Probate Rules of April, 1887, "In a grant of probate of the will of a married woman, or of the will of a widow made during coverture, or letters of administration with such wills annexed, it shall not be necessary to recite in the grant, or the oath to lead the same, the separate personal estate of the testatrix, or the power or authority under which the will has

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LEMAN, IN THE GOODS OF.

can no longer obtain a cæterorum grant. Were he to prove the will without first obtaining limited administration, he might be held to have assented to the disposition. A grant of limited administration has been made under similar circumstances by Gorell Barnes J. in *In the Goods of Donovan.* (1)

SIR F. H. JEUNE, PRESIDENT. A grant may be made to the applicant of administration to such of his wife's property as she had no power to dispose of by will.

The form of the order was "that letters of administration of all the estate which by law devolves on or vests in the personal representative of Honor Leman deceased be granted to Thomas Leman, her lawful husband, save and except such estate as she had a right to dispose of and has disposed of by a will dated October 3, 1889."

Solicitors: *C. T. Pritchard, for R. T. Walter, Ilminster.*

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been or purports to have been made. The probate, or letters of administration with will annexed, in such cases shall take the form of ordinary grants of probate or letters of administration with will annexed, without any exception or limitation, and issue to an executor or other person authorized in usual course of representation to take the same; a surviving husband, however, being entitled to the same in preference to the next of kin of the testatrix in case of a partial intestacy."

(1) (1898) 78 L. T. 567.

H. D. W.

[IN THE COMMISSARY COURT OF CANTERBURY.]

1898
June 28.

THE VICAR AND CHURCHWARDENS OF ST. SAVIOUR, WESTGATE-ON-SEA *v.* THE PARISHIONERS OF THE SAME, HOUSEMAN INTERVENING.

Ecclesiastical Law — Faculty—Jurisdiction —Re-pewing of portion of New Parish Church originally appropriated to School Children—Absence of power in Ordinary to authorize the Creation of Pew-rents—Position of Parishioners subscribing to Church Expenses—The Church Building Act, 1818 (58 *Geo.* 3, *c.* 45), *ss.* 75, 77, 84, 85—*The Church Building Act*, 1822 (3 *Geo.* 4, *c.* 72), *ss.* 36, 37—*Churchwardens.*

The seats in a new parish church were in 1885 allotted by the Ecclesiastical Commissioners as follows: two pews for the vicar of the parish and his family; 315 sittings to be let to pew-renters; 222 sittings as free seats, and seventy-two sittings as seats for children, in the expectation that the population of the parish would in the main be composed of working men. This expectation was not realized, and in 1898 the vicar and churchwardens of the parish applied to the Ordinary to authorize by faculty the substitution of pews for adults in the place of the seventy-two sittings allotted as children's seats as above mentioned, and the letting of the substituted pews at pew-rents to be expended in church improvements and expenses:—

Held, that the Ordinary had no jurisdiction to grant a faculty appropriating to other purposes seats allotted by the Ecclesiastical Commissioners as free seats or authorizing the letting of any seats to pew-renters, but that a faculty might be decreed in his discretion for the substitution of pews for adults in which the churchwardens might seat parishioners in the place of the seventy-two sittings for children; the allotment of such sittings having been made by the Ecclesiastical Commissioners without statutory authority.

Semble, the churchwardens of a church built under the Church Building Acts may in seating the parishioners in seats in the church not appropriated to pew-renters or allotted as free seats by the Ecclesiastical Commissioners give a preference to applicants who voluntarily subscribe to a fund for church improvements and expenses.

THIS was a cause of faculty instituted on behalf of the Rev. Augustus A. Lyne, the vicar, and William Minter and Arthur Hunter, the churchwardens, of the parish of St. Saviour, Westgate-on-Sea, in the county of Kent and diocese of Canterbury,

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for the purpose of obtaining a faculty authorizing the carrying out of the following works:—The removal of twelve pews of children's seats—seventy-two sittings—in the north aisle of St. Saviour, Westgate-on-Sea; the substitution for such seats of nine pews of adult sittings, and the appropriation and letting of the forty-five sittings thus obtained at seven shillings and sixpence per annum; the income therefrom to be vested in the churchwardens for the time being, and to be expended by them as to the first year's income in payment of the cost of the alterations, and as to the income of future years at their discretion upon improving the ventilation, lighting, or heating of the church, or upon necessary repairs and improvements. (1)

The suit was now heard before the Commissary-General of the City and Diocese of Canterbury (Dr. Tristram, Q.C.). (2)

The vicar in person moved for the faculty, and together with one of the churchwardens gave evidence orally in support of the petition.

Mr. Henry Houseman, a parishioner of St. Saviour, appeared, and, whilst admitting that if the Court had jurisdiction, the petitioners had made out a case to have their application granted, submitted that the faculty could not legally be granted, the Court having no power to appropriate to particular persons any of the seats set apart by the Ecclesiastical Commissioners as free seats, or to fix pew-rents either in respect of such free seats or of any other seats in the church.

DR. TRISTRAM. In this case the vicar and churchwardens of the new parish of St. Saviour, Westgate-on-Sea, have applied to the Court to authorize them by faculty to remove twelve pews of children's seats in the north aisle of the church, which on its consecration were allotted by deed by the Ecclesiastical Commissioners as sittings for children, and to substitute for the

(1) Resolutions in favour of the carrying out of these works were sanctioned at a duly convened vestry meeting of the parish.

(2) The Court sat in the library of Lambeth Palace.

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same pews for adult persons with power to the churchwardens to let the seats therein at seven shillings and sixpence per sitting to parishioners, subject to the rents being appropriated towards the improvements and the repairs of the church.

The church was consecrated in the year 1884. Excluding two pews set apart for the vicar as below stated, it contains sittings for 609 persons.

These sittings were allotted by the Ecclesiastical Commissioners by an instrument dated February 26, 1885, purporting to have been executed under powers contained in the following Church Building Acts: 58 Geo. 3, c. 45; 59 Geo. 3, c. 134; 3 Geo. 4, c. 72, and 8 & 9 Vict. c. 70. By this allotment two pews were set apart for the use of the vicar, his family and servants; 315 sittings were allotted to be let at rents to be paid to the vicar as part of his income; 222 sittings as free seats, and seventy-two sittings as seats for children.

The material sections in these Acts applicable to this allotment are s. 75 of the Church Building Act, 1818 (58 Geo. 3, c. 45) providing that the commissioners on the consecration of a church built under the Act shall set apart in the body of the church one seat or pew for the use of the minister and his family, and one seat or pew for the use of his servants, and shall also set apart for the use of poor persons not less than one-fifth of the whole of the sittings, with the words "free seats" affixed thereto, for which no rents shall be paid, and s. 77 of the same Act, which provides that all the pews or seats excepting those set down as free seats shall be chargeable with the rents set down in a schedule signed by the commissioners.

It is to be noted that neither this Act nor the three subsequent Acts (59 Geo. 3, c. 134; 3 Geo. 4, c. 72, and 8 & 9 Vict. c. 70) under which the seats are allotted confer any power on the commissioners to appropriate sittings for children.

It seems, therefore, to the Court, that the allotment of the seats to school children is ultra vires, and as by ss. 84 and 85 of the Church Building Act, 1818 (58 Geo. 3, c. 45), and ss. 36 and 37 of the Church Building Act, 1822 (3 Geo. 4, c. 72), there is

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reserved to the Chancellor of the Diocese the same jurisdiction in respect of this church as he is entitled to exercise in other churches in the diocese, it is competent to the Court by faculty to authorize the substitution of pews for adult persons in the place of the present children's pews, in order that such new pews may be allotted by the churchwardens to parishioners—upon the Court being satisfied upon the evidence that it would be a proper exercise of its discretion to do so.

By the evidence it appears that the large allotments of free seats and of sittings for children were made on the assumption that the population of the new parish would be in the main composed of the working classes, whereas, as a matter of fact, it is composed almost wholly of persons who can well afford and are anxious to rent sittings; that the children of the poor only occupy about twenty-five sittings, and the remainder of the seventy-two children's sittings, being too small for adults, are useless, and on an average about seventy of the free seats are unoccupied out of the season; that the churchwardens have applications for upwards of forty-three sittings from parishioners who are willing to pay rents for the same, and that the only way in which they can meet this demand is by substituting adult sittings for the children's sittings, and by seating the children in five of the free unoccupied pews at the west end of the church, where they will not distract the congregation, as they do when sitting in those seats now allotted to them, which are near the pulpit.

Upon this evidence the Court is prepared to sanction by faculty the substitution for children's seats of sittings for adults which will place some forty-five sittings at the disposal of the churchwardens, and the permanent removal of the children to the free seats at the west end of the church.

The Court is further asked to give authority by faculty to the churchwardens to let these new sittings at seven shillings and sixpence per sitting, for the purpose of supplying a fund for the improvements and repairs of the church.

Mr. Houseman, who is a parishioner and is a London solicitor, has entered an appearance as defendant in the suit, but has

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Dr. Tristram.

stated in court that he does not oppose the issue of the faculty as prayed, provided it can be legally granted.

The Court has no authority either under the general law or the Church Building Acts to empower the churchwardens to let these pews. The Ecclesiastical Commissioners might by the instrument of allotment they executed have appropriated the rents of certain pews for the sustentation and repairs of the church. But as they have not done this, and as the payment of church-rates is no longer enforceable by law, the Court sees no objection to the churchwardens in allotting these seats giving a preference to those parishioners who are prepared to subscribe towards a fund for the improvements and repairs of the church in the proportions suggested. Where a voluntary church-rate is collected in a parish, it seems to the Court that the churchwardens, in allotting sittings, should give priority to parishioners who pay the rate; and that in a parish where a voluntary church-rate is not collected, they may fairly give priority to parishioners who contribute to a fund formed as a substitute for a church-rate. Such action is clearly within the spirit of the Church Building Acts, as well as of the Act for the Abolition of Compulsory Church Rates.

C. F. J.

1898
Aug. 2.

[DIVISIONAL COURT.]

THE VULCAN.

Admiralty—County Court—Practice—Tender—Costs—Final Order—Appeal—County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 17), *s.* 26—*County Court Rules*, 1892, *Order* XXXIX. *B., rr.* 48, 50.

The plaintiffs instituted an Admiralty action in a county court for damages for breach of contract in relation to the use or hire of a ship "in the sum of 30*l.* and costs." The defendants paid into court 17*l.* 10*s.* "in satisfaction of the whole of the plaintiffs' claim herein" together with a denial of liability. The plaintiffs accepted the 17*l.* 10*s.* in satisfaction of the claim in respect of which it was paid in, but their application for taxation, and payment by the defendants, of the costs of the action was refused without leave to appeal:—

Held, by the Divisional Court (Sir F. H. Jeune P. and Gorell Barnes J.), first, that the order refusing the plaintiffs their costs was a final order within the meaning of s. 26 of the County Courts Admiralty Jurisdiction Act, 1868, and, therefore, no leave to appeal was required; secondly, that this being an Admiralty action the special Admiralty rules of the county court, and not the general common law rules, applied, so that the sum paid into court by the defendants was to be treated as by way of "tender" under rule 48 of Order XXXIX. B. of the County Court Rules, 1892, and, on acceptance of the tender, the plaintiffs were entitled, under rule 50, to taxation and payment of their costs.

APPEAL by plaintiffs from an order of the judge of the City of London Court refusing their application for taxation and payment of their costs by the defendants.

The question turned on the meaning of the word "tender" in rules 48, 49, 50 of Order XXXIX. B. of the County Court Rules (Admiralty), 1892. (1)

(1) County Court Rules, 1892, Order XXXIX. B. Admiralty Actions. Tenders:—

Rule 48: "The party desiring to make a tender shall give a notice to the adverse party of the terms and amount of the tender, and shall pay the amount into court, and deliver a præcipe. Money may be paid into court with a denial of liability, in which case the form in the appendix shall be altered accordingly."

Rule 49: "Within forty-eight hours after the receipt of the notice of any such payment into court the adverse party shall file a notice stating whether he accepts or rejects the tender, and, if he shall fail to do so, he shall be deemed to have rejected it."

Rule 50: "A party accepting a

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The facts were shortly as follows :—

On February 23, 1898, the plaintiffs, Clarke, Sharp & Co., owners of the steamship *Vulcan*, instituted an action, under the Admiralty jurisdiction of the City of London Court, for damages for breach of contract in relation to the use or hire of a ship "in the sum of 30*l.* and costs." The defendants, A. & F. Good, charterers of the vessel, entered an appearance, and after some correspondence, their solicitors, on May 14, paid 17*l.* 10*s.* into court "in satisfaction of the whole of the plaintiffs' claim herein, and we hereby give notice that notwithstanding such payment the defendants deny their liability." On May 18 the plaintiffs gave notice that they accepted the sum of 17*l.* 10*s.* paid by the defendants into court, in satisfaction of the claim in respect of which it was paid in. As the registrar declined to tax the plaintiffs' costs, they, on May 31, gave notice of motion for liberty to tax their costs, and "that the defendants be ordered to pay such costs forthwith after taxation." On June 3 the learned judge ordered that the application of the plaintiffs for an order for payment of their costs by the defendants be refused.

F. Laing, for the respondents (defendants) took the preliminary objection that the appeal would not lie, as under s. 26 of the County Courts Admiralty Jurisdiction Act, 1868, leave was required in the case of an interlocutory order. (1)

[THE PRESIDENT. Why is this an interlocutory order?]

Because it does not determine the rights of the parties. That is the distinction drawn when the question arises as to the difference in the length of notice required in the case of interlocutory and final appeals in the Court of Appeal under

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tender shall be entitled to his costs of suit, and shall be at liberty to tax and enforce payment of same without the necessity of an application to the Court for the purpose."

(1) 31 & 32 Vict. c. 71, s. 26: "An appeal may be made to the High Court of Admiralty of England from a final decree or order of a county court in an Admiralty cause, and, by permission of the judge of the county court, from any interlocutory decree or order therein, on security for costs being first given, and subject to such other provisions as general orders shall direct."

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the Rules of Supreme Court, 1883, Order LVIII., r. 3: *Salaman* v. *Warner*. (1)

THE COURT overruled the objection on the ground that the order was not interlocutory in the sense of being a step in the action, but a final decision binding the parties on the only matter remaining in litigation between them.

Kilburn, for the appellants (plaintiffs). This is an Admiralty action, and the notice of payment into court by the defendants substantially followed Form No. 333, which is the form referred to in rule 48 of the County Court (Admiralty) Rules, 1892, relating to tender. On accepting the tender the plaintiffs are by rule 50 entitled to their costs of suit. These rules are in conformity with the practice of the Admiralty Court as laid down in *The Mona*. (2) Under that practice, as distinguished from the common law practice, the costs are uncertain, and are not stated in the summons so as to enable the defendant to know what sum to pay into court in respect of them. The tender is, therefore, not accompanied by an offer to pay costs: *The William Symington*. (3) There is no difference in Admiralty between tender in a salvage action and in other cases, so that these rules apply generally to payments into court in Admiralty actions. The learned county court judge was, therefore, wrong, in not giving the plaintiffs liberty to tax their costs.

F. Laing, for the respondents (defendants). The plaintiffs are not entitled to costs, as their acceptance of the sum amounted to an agreement to take the 17*l.* 10*s.* in satisfaction of their claim of 30*l.* and costs. Although brought on the Admiralty side of the county court, under the Act of 1869, this is a common law action for breach of contract, and the payment into court was made under Form 104A, by which the payment into court can be made in satisfaction of the whole of the plaintiffs' claim together with a denial of liability. This form is drawn in accordance with Order IX., r. 11, of the

(1) [1891] 1 Q. B. 734. (2) [1894] P. 265.
(3) (1884) 10 P. D. 1.

County Court Rules, 1889, which is based on s. 107 of the County Courts Act, 1888 (51 & 52 Vict. c. 43).

There is nothing about a tender in the wording of the notice paying the money in, and, though it is true that in rule 11 reference is made to a payment for costs, yet the words are "if any," and sub-rule 3 of the same rule contemplates the payment into court of money without costs, so that under these rules the defendants can do what they have done in this case, that is, pay into court a lump sum to include costs.

If the plaintiffs intended to apply for costs, they should have so stated by filling in the Form 104A (1896) which specially provides for this contingency. The county court has power under Order IX., sub-rule 3 of rule 12A, to "order the defendant to pay such fees and costs, beyond the fees and costs (if any) paid into court," but that is by the rule made a matter of discretion. The learned judge of the Court below has exercised his discretion in this case by refusing to make an order for costs, and with that discretion this Court will not interfere.

Kilburn, in reply. Order IX., r. 11, of the County Court (Common Law) Rules, 1889, requires that where money is paid into court, otherwise than with a plea of tender, the defendant must also pay into court fees proportionate to the amount paid in and solicitors' costs. The fees are specified on the ordinary plaint note, and must be paid five days before the return day. As the defendants did not comply with these provisions, it must be taken that the payment in was by way of tender under the Admiralty Rules, and therefore rule 50 of Order XXXIX. B applies, so that the right to costs follows.

THE PRESIDENT (SIR F. H. JEUNE). The question is whether the rules applicable to common law proceedings in the county court, or the rules specially applying to Admiralty actions, govern this case. My view is that, in an Admiralty action, where there are special rules applicable, they override the common law rules; and that view seems to have been followed in this case, because the defendants, when filling in the præcipe for paying the money into court, substantially followed No. 333 of the Admiralty forms in the county court.

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I think, therefore, that the special rules 48 to 50 contained in Order XXXIX. B. of the County Court (Admiralty) Rules, 1892, apply. It has been pointed out by counsel for the plaintiffs that the common law rules proceed upon a different principle from that which has been followed by the defendants in this case, for, under the common law rules, the court fees and costs must be paid in at the same time; and it then lies with the plaintiffs whether they will elect to take the money and costs or apply for further costs. In this case no sum was paid into court for fees or costs.

A difficulty no doubt arises in applying the Admiralty rules, because the word "tender" is used in all three; but the word seems to be used in the Admiralty sense indicated in *The Mona* (1), and not in the common law sense. Rule 48 also allows the payment into court to be made with a denial of liability, and rule 49 appears to apply the word "tender" to both kinds of payment into court mentioned in rule 48, that is, without or with a denial of liability. I think that in rule 50 tender may be supposed to be used in the same sense as in rule 49, and be intended to cover a payment into court with a denial of liability. In the result—though it would be well if these rules were made more explicit—I think that rules 48 to 50 apply; and, therefore, the appellants are entitled to an order for the taxation of their costs.

GORELL BARNES J. concurred.

Appeal allowed with costs.

Solicitors for appellants (plaintiffs): *Keene, Marsland, Bryden & Besant.*

Solicitors for respondents (defendants): *Bramall, White & Sanders, for Walker & Barker, Nottingham.*

(1) [1894] P. 265.

T. L. M.

STANLEY *v.* STANLEY.

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Aug. 8.

Divorce—Permanent Maintenance—Payment to Wife without Settlement—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 32.

Where, on a petition for permanent maintenance by a wife, who had obtained a divorce from her husband on the ground of adultery and desertion, it appeared that the husband had not been heard of for several years and that there was a sum of 320*l.* standing to his credit in an action in the Chancery Division, the Court ordered the wife's costs to be paid out of the fund, and the balance to be paid to her for her and her children's maintenance.

Morris v. *Morris*, (1861) 31 L. J. (P. M. & A.) 33, followed.

Motion to confirm the report of the registrar on a petition for permanent maintenance presented by Margaret Anne Stanley, for the dissolution of whose marriage with Edward Stanley a decree had been made absolute.

The marriage had been dissolved on the ground of adultery and desertion, and the custody of the two children of the marriage granted to the petitioner. The respondent had eloped with another woman, taking with him all the money that he was known to have, and had not been heard of for eight years. On the death of his mother in 1895, he had become entitled to a sum of 320*l.*, which stood to his credit under an order made in a suit in the Chancery Division. The petitioner was without means, and she and her children were dependent upon their relations.

The registrar submitted that part of the fund should be applied to the payment of the petitioner's costs, and that the balance should be paid to her for her and her children's maintenance.

Le Bas, in support of the motion. After the payment of the wife's costs, the sum in court will be reduced to an amount which it would be futile to settle.

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STANLEY v. STANLEY.

GORELL BARNES J. I think that the order may be made on the authority of that made by Sir C. Cresswell in *Morris* v. *Morris*. (1)

Solicitors: *Martyn & Martyn, for Leigh & Horley, Cardiff.*

H. D. W.

1898
Aug. 12.

DOWLING *v.* DOWLING.

Divorce—Separation Deed.

A husband having been guilty of cruelty, he and his wife separated upon the terms of a deed by which they agreed that neither party should take proceedings against the other for dissolution of marriage or judicial separation on the ground of previous misconduct, but that the deed should be void in case the marriage should be dissolved or a judicial separation granted on the ground of subsequent misconduct by either. The husband afterwards committed adultery. He did not plead the deed in answer to his wife's petition.

The Court granted a decree nisi for the dissolution of the marriage.

Rose v. *Rose*, (1882) 7 P. D. 225; (1883) 8 P. D. 98, distinguished.

THE petitioner Elizabeth Mary Dowling claimed a divorce from the respondent William Dowling on the ground of his adultery and cruelty.

It appeared that the marriage took place in 1870. The respondent was a man of drunken habits and frequently assaulted his wife. In 1897 they separated upon the terms of a deed which provided that "neither shall take any proceedings against the other to obtain a divorce or judicial separation in respect of any misconduct which has heretofore taken place," but that "if they shall be reconciled and return to cohabitation, or if the marriage shall be dissolved or they shall be judicially separated by reason of any misconduct on the part of either occurring after the date hereof, then and in such case the covenants herein contained shall be void." The husband was at the date of the petition living in adultery. He did not plead the deed in answer to the petition.

(1) 31 L. J. (P. M. & A.) 33.

Barnard, for the petitioner. A decree nisi should be granted. This separation deed is a different instrument from that the effect of which was considered by Sir James Hannen and the Court of Appeal in *Rose* v. *Rose*. (1) It is to be void in case of a judicial separation granted for subsequent adultery. It therefore by its terms revives the right of the petitioner to complain of the previous cruelty. The respondent has also not thought fit to plead the deed, which may have been obtained by fraud: *Tress* v. *Tress*. (2)

GORELL BARNES J. I think that the case may be distinguished from *Rose* v. *Rose* (1) on the ground that the deed of separation has not been pleaded by the husband. I grant the wife a decree nisi with costs.

Solicitors: *Layton, Sons & Lendon.*

(1) 7 P. D. 225; 8 P. D. 98. (2) (1887) 12 P. D. 128.

H. D. W.

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DIVORCE—*Costs—Pauper Petitioner — Practice —Intervention of Queen's Proctor.*

A pauper petitioner, who is unsuccessful upon the intervention of the Queen's Proctor, is liable to be condemned in the full costs of the intervention. WHITE *v.* WHITE - **Jeune Pres. 124**

2. —— *Desertion—Husband absconding under Criminal Charge.*

Where it appeared that more than two years before a wife's petition for dissolution, her husband, who had formed an adulterous connection with another woman, had absconded in order to avoid criminal proceedings, falsely stating to her that he intended to be away only for a short time, and had since concealed his address from her, the Court, on the authority of *Drew* v. *Drew*, (1888) 13 P. D. 97, found him guilty of desertion. WYNNE *v.* WYNNE - - **Jeune Pres. 18**

3. —— *Judicial Separation—Jurisdiction—Domicil—Matrimonial Home—Residence within Jurisdiction at Commencement of Suit—Cruelty committed outside Jurisdiction—Apprehension of further Acts of Cruelty—Power of Ecclesiastical Court to grant Relief—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *ss.* 7, 22, 25, 26.

By the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 22, "In all suits and proceedings, other than proceedings to dissolve any marriage, the said Court shall proceed and act and give relief on principles and rules which, in the opinion of the said Court, shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have hitherto acted and given relief."

In a proceeding for a divorce a mensa et thoro on the ground of cruelty, where the parties resided within its jurisdiction at the commencement of the suit, an Ecclesiastical Court would have granted relief irrespective of their domicil, and it would have made no difference that the necessity for protection arose in consequence of cruelty committed outside its jurisdiction, where the apprehension of further acts of cruelty remained.

The petitioner for a judicial separation had been, before her marriage, a domiciled Englishwoman. Her husband's domicil was in Australia, where, after her marriage, she resided with him. Owing to cruelty committed by him while they were travelling in Italy, she sought the protection of her parents in England, and established a home for herself and her children in this country. He followed her here and required her to return to him with the children, which she was afraid to do owing to her apprehension of a repetition of the cruelty. At the commencement of the suit both parties were living within the jurisdiction:—

Held, that the Court, exercising the power of the Ecclesiastical Court under the section, had jurisdiction to entertain the suit. ARMYTAGE *v.* ARMYTAGE - - - **Gorell Barnes J. 178**

4. —— *Justices—Duty of Clerk to Justices —Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39), *ss.* 4, 5, 11—*Appeal to Probate Division.*

On an application by a married woman for an order for judicial separation, custody of children, or maintenance, under s. 5 of the Summary Jurisdiction (Married Women) Act, 1895, it is the duty of the clerk to the justices to make a note of the evidence and of the reasons for the decision, and supply the note, should there be an appeal, to the Probate Division. ROBINSON *v.* ROBINSON **Div. Ct. 153**

5. —— *Maintenance—Permanent Maintenance —Clause "dum sola" without "et casta."*

An order for permanent maintenance may be made containing a clause "dum sola vixerit" without the addition of "et casta." SMITH *v.* SMITH - - - - **Jeune Pres. 29**

6. —— *Maintenance—Permanent Maintenance —Large Income—Settled Property that of Husband alone—Test of what would have been an adequate Jointure—Clause "dum sola et casta."*

A wife obtained a divorce from her husband on the ground of his adultery and cruelty. The income of the husband had been 19,000*l.* a year, and the wife, who had herself brought nothing into settlement, had 1400*l.* a year under her marriage settlement.

The Court, on the petition of the wife for permanent maintenance, considering that 3000*l.* a year would have been an adequate jointure for the widow of a man in the husband's position, granted her 1600*l.* a year in addition to her present allowance, the additional 1600*l.* a year to be payable "dum sola et casta vixerit."

Sykes v. *Sykes*, [1897] P. 306, and *Wood* v. *Wood*, [1891] P. 272, followed. KETTLEWELL *v.* KETTLEWELL - - - **Jeune Pres. 138**

7. —— *Maintenance—Permanent Maintenance —Payment to Wife without Settlement—Costs—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 32.

Where, on a petition for permanent maintenance by a wife, who had obtained a divorce from her husband on the ground of adultery and desertion, it appeared that the husband had not been heard of for several years, and that there was a sum of 320*l.* standing to his credit in an action in the Chancery Division, the Court ordered the wife's costs to be paid out of the fund, and the balance to be paid to her for her and her children's maintenance.

Morris v. *Morris*, (1861) 31 L. J. (P. M. & A. 33), followed. STANLEY *v.* STANLEY **Gorell Barnes J. 227**

8. —— *Rape—Divorce Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 27.

A respondent, who had been convicted, under s. 4 of the Criminal Law Amendment Act, 1885, of an attempt to have unlawful and carnal knowledge of a girl under the age of thirteen, was found to have been guilty of rape, and a degree nisi granted for the dissolution of his marriage. COFFEY *v.* COFFEY - **Gorell Barnes J. 169**

9. —— *Separation Deed — Dissolution of Marriage.*

A husband having been guilty of cruelty, he and his wife separated upon the terms of a deed

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by which they agreed that neither party should take proceedings against the other for dissolution of marriage or judicial separation on the ground of previous misconduct, but that the deed should be void in case the marriage should be dissolved or a judicial separation granted on the ground of subsequent misconduct by either. The husband afterwards committed adultery. He did not plead the deed in answer to his wife's petition.

The Court granted a decree nisi for the dissolution of the marriage.

Rose v. *Rose*, (1882) 7 P. D. 225; (1883) 8 P. D. 98, distinguished. DOWLING *v.* DOWLING
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ECCLESIASTICAL LAW—*Appeal—Jurisdiction—Criminal Suit against Rector for Non-repair of Chancel—Repairs done by Churchwardens—Practice—Dismissal of Appeal without hearing Argument—Surrogate.*

Where on an appeal by promoters it appeared from the process transmitted to the Arches Registry that the Court below had no jurisdiction over the cause in which the appeal was asserted, and might be liable to be stopped by a writ of prohibition if it entertained the appeal, the Court of Arches, having before it an application by the appellants for leave to proceed with the appeal, notwithstanding the proper time for filing the appellants' proxy had elapsed, dismissed the appeal with costs without hearing arguments from either the appellants or the respondent.

The Ecclesiastical Courts have no jurisdiction to entertain a criminal suit against a lay rector who has neglected to perform his duty of repairing the chancel of the church of which he is the rector, unless the chancel was out of repair at the time of the institution of the suit. NEVILLE *v.* KIRBY - - **Consist. Ct. of Lichfield 160**

2. —— *Faculty—Footpath across Churchyard for Use of Parishioners and Public—Proviso for closing Footpath on one Day in the Year.*

In a faculty granted for a fenced-in footpath across a closed parish churchyard for the use of the parishioners with right of way for the public, a proviso was inserted for the footpath to be closed on one day in the year in order to shew that it remained an integral portion of the churchyard with certain limitations on its use. ST. JOHN THE BAPTIST, CARDIFF (VICAR OF) *v.* PARISHIONERS OF SAME - - **Consist. Ct. of Llandaff 155**

3. —— *Faculty—Jurisdiction—Re-pewing of portion of New Parish Church originally appropriated to School Children—Absence of power in Ordinary to authorize the Creation of Pew-rents—Position of Parishioners subscribing to Church*

ECCLESIASTICAL LAW—*continued.*
Expenses—Church Building Act, 1818 (58 *Geo.* 3, *c.* 45), *ss.* 75, 77, 84, 85—*Church Building Act*, 1822 (3 *Geo.* 4, *c.* 72), *ss.* 36, 37—*Churchwardens.*

The seats in a new parish church were in 1885 allotted by the Ecclesiastical Commissioners as follows: two pews for the vicar of the parish and his family; 315 sittings to be let to pew-renters; 222 sittings as free seats, and seventy-two sittings as seats for children, in the expectation that the population of the parish would in the main be composed of working men. This expectation was not realized, and in 1898 the vicar and churchwardens of the parish applied to the Ordinary to authorize by faculty the substitution of pews for adults in the place of the seventy-two sittings allotted as children's seats as above mentioned, and the letting of the substituted pews at pew-rents to be expended in church improvements and expenses:—

Held, that the Ordinary had no jurisdiction to grant a faculty appropriating to other purposes seats allotted by the Ecclesiastical Commissioners as free seats or authorizing the letting of any seats to pew-renters, but that a faculty might be decreed in his discretion for the substitution of pews for adults in which the churchwardens might seat parishioners in the place of the seventy-two sittings for children; the allotment of such sittings having been made by the Ecclesiastical Commissioners without statutory authority.

Semble, the churchwardens of a church built under the Church Building Acts may in seating the parishioners in seats in the church not appropriated to pew-renters or allotted as free seats by the Ecclesiastical Commissioners give a preference to applicants who voluntarily subscribe to a fund for church improvements and expenses. VICAR OF ST. SAVIOUR, WESTGATE-ON-SEA *v.* PARISHIONERS OF SAME, HOUSEMAN INTERVENING
Commissary Ct. of Canterbury 217

4. —— *Faculty — Refusal of Confirmatory Faculty—"Stations of the Cross"—Crucifixes—Communion Rails—Tables of Ten Commandments, Lord's Prayer, and Apostles' Creed—Chancel Platform—Darkening of Windows in Chancel—Lamps reflecting Light on Communion Table—Faculty—Communion Table—Reredos—Second Communion Table in Side Chapel.*

The incumbent of a parish church having without a faculty, and contrary to the vote of the vestry and the wishes of the parishioners, introduced into the church pictures representing the "Stations of the Cross" proved to have been used superstitiously and four crucifixes, placed curtains over the Ten Commandments, the Lord's Prayer, and the Apostles' Creed engraved on the east chancel wall, and darkened the chancel by affixing permanent blinds on the east window and a side chancel window, the Court ordered that within three months the "Stations of the Cross," the crucifixes, and the curtains should be removed out of the church by the incumbent, and the outside blinds over the above-mentioned windows taken down by him.

If the incumbent should not comply with the order of the Court within three months of its date, the Court would be prepared to issue a

ECCLESIASTICAL LAW—*continued.*

faculty to the parishioners' churchwarden to carry out the order.

The erection in the chancel of a Communion Table with a reredos in substitution for the Communion Table formerly there, though made by the incumbent in opposition to a vote of the vestry, was sanctioned by a confirmatory faculty from the Court, on the ground of its being an artistic improvement to the church, subject to the platform on which the Communion Table stood being extended round the north end of the Table so as to enable the minister to officiate during the Communion Service standing at the north end.

The Court also sanctioned by confirmatory faculty the erection in the church of a side chapel with a Communion Table in it, though objected to by the parishioners, subject to the chapel being separated from the church on a plan to be approved of by the Court.

Sieveking v. *Kingsford*, (1866) 36 L. J. (Ecc.) 1, followed. *In re* St. Mark's, Marylebone Road. Vicar of St. Mark's *v.* Parishioners of St. Mark's - - **Consist. Ct. of London 114**

5. —— *Jurisdiction—Criminal Suit against Churchwardens—Duty of Churchwardens to obtain Faculty before Removing Human Remains — Burial Act*, 1857 (20 & 21 *Vict. c.* 81), *s.* 23—*Faculty to carry out Directions in Order in Council for Preventing Vaults becoming Dangerous to Public Health.*

The churchwardens of a parish church wholly closed for burials, who, purporting to act under the provisions of an Order in Council under the 23rd section of the Burials Act, 1857, directing the removal and reinterment elsewhere of human remains underneath the church, do or cause to be done the acts therein directed without obtaining a faculty from the Ordinary, are guilty of an offence against the laws ecclesiastical, in respect of which they may be cited to appear to answer articles to be administered to them in a criminal suit.

The 23rd section of the Burial Act, 1857, provides (inter alia) that it shall be lawful for Her Majesty, upon the representation of one of Her Majesty's principal secretaries of State, by and with the advice of Her Privy Council from time to time, to order such acts to be done by or under the direction of the churchwardens or such other persons as may have the care of any vaults or places of burial, for preventing them from becoming or continuing dangerous or injurious to the public health, and such churchwardens or other persons shall do or cause to be done all acts ordered as aforesaid.

Orders in Council issued under the above section and served on the churchwardens of a parish church ordered that the churchwardens or the persons having the care of the vaults under the church should adopt or cause to be adopted the following measures, namely, that the whole of the human remains lying beneath the floor of the church should be removed, and reburied in a specified cemetery or in some other legal burial ground. In consequence of the service of these Orders in Council, the churchwardens, without having obtained any faculty from the Ordinary, pulled down all the pews in

ECCLESIASTICAL LAW—*continued.*

the church, took up the flooring and monumental slabs in the same, and removed certain coffins and human remains buried thereunder, for the purpose of reinterring them elsewhere. It appeared that burials in the parish had been by law wholly discontinued in the year 1853, and that since that year no burial was recorded to have taken place there:—

Held, that the acts of the churchwardens, not having been authorized by a faculty, were illegal, and the Orders in Council afforded no justification for what had been done by them: such Orders being either wholly ultra vires or to be construed as merely directing an application for a faculty to carry out their terms:

Held, also, that, on the petition of the rector of the parish church and the churchwardens, a faculty might issue authorizing for sanitary reasons the removal of the remains and their reinterment in consecrated ground. Lee *v.* Hawtrey - - **Consist. Ct. of London 63**

EXAMINATION—Conduct money—Practice **15**
See Probate. 8.

EXECUTION—Warrant of—Judgment in rem—Sale of ship—Jurisdiction - **52**
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EXECUTOR—Renunciation—Retractation of renunciation - - - - **12**
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FACULTY—Duty of churchwardens to obtain, before removing human remains **63**
See Ecclesiastical Law. 5.

—— Footpath across churchyard—Proviso for closing on one day in the year - **155**
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—— Jurisdiction—Pews—Position of parishioners subscribing to church expenses
See Ecclesiatical Law. 3. **217**

—— "Stations of the Cross"—Chancel platform—Darkening of windows in chancel **114**
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FIRE—Policy—Coal cargo—Heating—Discharge and sale—Loss of freight - **30**
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FOOTPATH—Faculty—Proviso for closing footpath across churchyard on one day in the year - - - - **155**
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FREIGHT—Charterparty—Bill of lading—Cost of discharge - - - **131**
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—— Loss of—Policy—Coal cargo—Heating—Discharge and sale—Peril of fire, &c.
See Insurance, Marine. **30**

GRANT AD COLLIGENDUM—Administration with the will annexed—Necessity for citation of heir-at-law - - **149**
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GRANT OF ADMINISTRATION.
See Cases under Probate.

GRANT OF PROBATE.
See Cases under Probate.

HEATING—Discharge and sale—Coal cargo—Policy—Loss of freight - - 30
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HUSBAND AND WIFE—Grant of administration—Limited administration—Will of married woman - - - 215
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—— Joint will—Grant of probate - - 7
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—— Permanent maintenance—Payment to wife without settlement—Costs - 227
See DIVORCE. 7.

—— Separation deed—Dissolution of marriage
See DIVORCE. 9. 228

—— Summary Jurisdiction (Married Women) Act—Duty of clerk to justices—Appeals.
See DIVORCE. 4. 153

INSURANCE (MARINE)—*Freight—Loss of—Policy—Construction—Coal Cargo—Heating—Discharge and Sale—Peril of "Fire . . . . and all other Losses and Misfortunes."*

The plaintiffs chartered their vessel to carry a cargo of coals from Newcastle, New South Wales, to Valparaiso at 15*s.* per ton payable on delivery, and they effected insurances with the defendant underwriters on the freight upon the ship by policies which insured against fire and "all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the subject-matter of the insurance or any part thereof."

The vessel only delivered a portion of the cargo at her port of discharge as, a few days after starting on the voyage, she was compelled to put into Sydney owing to the heating of the coals, and, on the recommendation of surveyors, the larger portion of the cargo was discharged and sold, entailing a consequent loss of freight:—

Held, by Gorell Barnes J., that the defendants were liable to make good to the plaintiffs the loss of freight as a partial loss under the policies, for, though no part of the coal was ever actually on fire, it was reasonably certain that, if the vessel had continued on her direct voyage, the temperature of the coal would have risen until spontaneous combustion ensued, involving, in all probability, the destruction of ship and cargo by fire, so that there was an existing condition of things producing imminent danger of fire, not merely a fear of fire, or, if it was not a loss by fire, it was a loss ejusdem generis covered by the words "all other losses and misfortunes." THE KNIGHT OF ST. MICHAEL Gorell Barnes J. 30

JOINT WILL—Husband and wife—Grant of probate - - - - 7
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JOINTURE—Test of what would have been an adequate jointure—Permanent maintenance - - - - 138
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JUDGMENT IN REM—Warrant of execution—Sale of ship—Jurisdiction - 52
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JURISDICTION—Appeal—Criminal suit against rector for non-repair of chancel - 160
See ECCLESIASTICAL LAW. 1.

—— Criminal suit—Duty of churchwardens to obtain faculty before removing human remains - - - - - 63
See ECCLESIASTICAL LAW. 5.

—— Domicil—Residence within jurisdiction at commencement of suit—Cruelty committed outside jurisdiction - 178
See DIVORCE. 3.

—— Faculty—Pews—Position of parishioners subscribing to church expenses - 217
See ECCLESIASTICAL LAW. 3.

—— Judgment in rem—Warrant of execution—Sale of ship - - - - 52
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—— Life salvage—Foreign vessel—Services "wholly or in part within British waters" - - - - 170
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—— Practice—County court—Service of summons—Agent - - - 198
See SHIP. 6.

—— Salvage—Receiver of wreck—Detention of property - - - - 206
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—— Wages—Action in rem—Ship's husband 59
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JUSTICES—Duty of clerk to—Summary Jurisdiction (Married Women) Act—Appeal to Probate Division - - 153
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LAND TRANSFER ACT, 1897—Administration—Grant to heir-at-law of intestate wife, passing over husband - - 147
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—— Administration—Practice—Real estate—Application by heir-at-law - 145
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—— Administration with the will annexed—Grant ad colligendum—Necessity for citation of heir-at-law - - 149
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LIEN—Maritime—Jurisdiction—Wages—Action in rem—Ship's husband - - 59
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—— Maritime—Sale of ship—Division of purchase-money—Mortgagees of shares 78
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—— Payment to wife without settlement 227
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—— Test of what would have been an adequate jointure—Clause "dum sola et casta"
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MARINE INSURANCE—Policy—Coal cargo—Heating—Discharge and sale—Loss of freight - - - - 30
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—— Sale of ship—Division of purchase-money—Mortgagees of shares - - 78
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MARRIAGE—Dissolution of.
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—— Joint will—Grant of probate - - 7
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—— Will of—Grant of administration—Limited administration - - - 215
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MARSHALLING ASSETS — Bottomry — Necessaries - - - - 1
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—— Life salvage—Foreign vessel—Jurisdiction —Services "wholly or in part within British waters" - - - 170
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—— Salvage—Jurisdiction—Receiver of wreck—Detention of property - - 206
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MISCONDUCT—Of widow—Grant of administration to son of intestate - - 126
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MORTGAGE—Sale of ship—Division of purchase-money—Mortgagees of shares - 78
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PEW — Faculty — Jurisdiction — Position of parishioners subscribing to church expenses - - - - - 217
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PILOTAGE—Compulsory—River Tyne—Collision - - - - - 127
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POLICY—Coal cargo—Heating—Discharge and sale—Loss of freight - - 30
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POWER—Will made in execution of limited power of appointment—Revocation 21
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—— Divorce.
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—— Presumption of death - 17, 27, 143
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PRESUMPTION — Death — Disappearance for seven years—Grant of administration—Practice - - - - 143
See PROBATE. 12.

—— Death—Practice—Affidavit of applicant 27
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—— Death—Time of application - - 17
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PROBATE—*Grant of Administration—Administration de bonis non—Grant to Attorney—Necessity for Notice.*

Where administration had been granted to the attorney of one of two next of kin, both of whom resided out of the jurisdiction, and the administrator died leaving the estate partly unadministered, the Court, upon proof of notice to the next of kin for whose benefit the administration had been granted, granted administration de bonis non to the attorney of the other next of kin. IN THE GOODS OF BARTON **Jeune Pres. 11**

2. —— *Grant of Administration—Grant to Heir-at-Law of Intestate Wife, passing over Husband—Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *Part I., s.* 2, *sub-s.* 4—*Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.

By the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), Part I., s. 2, sub-s. 4, "Where a person dies possessed of real estate, the Court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next of kin, shall be equally entitled to the grant with the next of kin, and provision shall be made by rules of Court for adapting the procedure and practice in the grant of letters of administration to the case of real estate."

A wife died intestate. Her husband survived

PROBATE—*continued.*

her, and she left a son by a former marriage, a minor, who was her heir-at-law.

On it appearing that the husband was a dissipated man, who was mismanaging a public-house which was part of the estate, and of which he refused to give up possession, the Court, acting under the sub-section and s. 73 of the Court of Probate Act, 1857, granted administration of the estate to the guardian ad litem of the infant heir-at-law. IN THE GOODS OF ARDERN
Gorell Barnes J. 147

3. —— *Grant of Administration — Limited Administration — Necessity for Annexation of Will.*

In granting, for the purpose of a conveyance, administration limited to certain leasehold property of a testator, the Court held that the will should be annexed to the grant. IN THE GOODS OF SAMUEL BUTLER - - **Jeune Pres. 9**

4. —— *Grant of Administration — Limited Administration—Will of Married Woman—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75)—*Probate Rules of April*, 1887.

Where, upon the death of a woman who had married before the commencement of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), it appeared that, before her marriage, she had acquired a mortgage debt, which her husband had not reduced into possession, and had since her marriage made a will purporting to dispose of all her real and personal property, the Court made a grant to her husband of administration to such of her property as she had no power to dispose of by will. IN THE GOODS OF LEMAN
Jeune Pres. 215

5. —— *Grant of Administration—Misconduct of Widow—Grant to Son of Intestate.*

Where the widow of an intestate, whose estate was small, was shewn to have been a woman of dissipated habits, who had eloped with another man sixteen years before the application, and had not since been heard of, the Court made a grant of administration to the only son of the intestate, without the citation of the widow.

In the Goods of Anderson, (1864) 3 Sw. & Tr. 489, followed. IN THE GOODS OF STEVENS
Jeune Pres. 126

6. —— *Grant of Administration—Practice—Real Estate—Application by Heir-at-Law—Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *Part I., s.* 2, *sub-s.* 4.

By the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), Part I., s. 2, sub-s. 4, "Where a person dies possessed of real estate, the Court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next of kin, shall be equally entitled to the grant with the next of kin, and provision shall be made by rules of Court for adapting the procedure and practice in the grant of letters of administration to the case of real estate."

Per Gorell Barnes J.: Where the title of the person applying under the sub-section for administration as heir-at-law is clear, and there is no personalty, a grant may be made to the applicant

PROBATE—*continued.*

without notice to the next of kin; but where the title of the applicant is doubtful, or the amount of the personalty large as compared with the realty, notice should be given to the next of kin. IN THE GOODS OF BARNETT
Gorell Barnes J. 145

7. —— *Grant of Administration with the Will annexed—Grant ad Colligendum—Necessity for Citation of Heir-at-Law—Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *Part I., s.* 2, *sub-s.* 4.

By the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), Part I., s. 2, sub-s. 4, "Where a person dies possessed of real estate, the Court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next of kin, shall be equally entitled to the grant with the next of kin, and provision shall be made by rules of Court for adapting the procedure and practice in the grant of letters of administration to the case of real estate."

By an additional rule and order, dated November 20, 1897, for the registrars of the principal and district registries: "All rules orders and instructions and the existing practice of the Court with respect to non-contentious business shall, so far as the circumstances of each case will allow, be applicable to grants of probate and administration made under the authority of the Land Transfer Act, 1897."

A married woman who owned certain farms made a will, by which she left her real estate to her husband for life, with remainder to her natural daughter absolutely, and all her personal estate to her husband, whom she appointed executor.

Her natural daughter died in her lifetime. Her husband died without proving the will, and administration of his personal estate was granted to his sister as next of kin. It was not known who was the heir-at-law of the testatrix. The value of the real estate was 7688*l.*, that of the personal estate 45*l.*:—

Held, on an application by the administratrix of the husband, for a grant of administration of the real and personal estate of the testatrix, that, having regard to the provisions of the sub-section, the heir-at-law not having been cited, a general grant ought not to be made, but that the applicant might take a grant ad colligendum, which would enable her to let and manage the farms, till the heir-at-law could be cited. IN THE GOODS OF ROBERTS - - - **Jeune Pres. 149**

8. —— *Conduct Money—Practice—Examination—Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 26.

Semble, that conduct money cannot be claimed in the first instance by a person who is directed to attend for the purpose of being examined pursuant to s. 26 of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77). IN THE GOODS OF WYATT - - - - **Jeune Pres. 15**

9. —— *Grant of Probate—Joint Will—Husband and Wife.*

Where a husband and wife made a joint will, the Court, upon the death of the wife, granted probate of so much of the instrument as became

PROBATE—*continued.*

operative upon her death. In the Goods of Piazzi-Smyth. - - - Jeune Pres. 7

10. —— *Presumption of Death—Practice—Affidavit of Applicant.*

On an application for leave to presume the death of a person who has disappeared, the affidavit of the applicant should contain a statement of belief that the death occurred at the alleged date. In the Goods of Hurlston Gorell Barnes J. 27

11. —— *Presumption of Death — Time of Application.*

The Court, on proof of sufficient inquiries, allowed the death of a testator to be sworn three years after his disappearance. In the Goods of Matthews - - - Jeune Pres. 17

12. —— *Presumption of Death from Disappearance for Seven Years—Grant of Administration—Practice.*

On an application, made in 1898, for leave to presume the death of a person who had not been heard of since 1891, of whose death no evidence was offered beyond the fact of his disappearance, and who had been cited in a suit which was pending in the Chancery Division, the Court, in giving leave to depose to the death, directed that the grant of administration should, except in so far as it might be required in the Chancery Division, remain in the registry till the expiration of seven years from the date of the disappearance. In the Goods of Winstone Gorell Barnes J. 143

13. —— *Renunciation—Executor—Retractation of Renunciation—Court of Probate Act,* 1857 (20 & 21 *Vict. c.* 77), *s.* 79.

The old practice which, in a proper case, allowed a co-executor who had renounced probate to retract his renunciation, is not abrogated by s. 79 of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77).

Where one of two executors absconded after taking probate, the Court allowed his co-executor, who had renounced, to retract his renunciation and take probate. In the Goods of Stiles Jeune Pres. 12

14. —— *Revocation of Will—Several Testamentary Papers—Will made in execution of Limited Power of Appointment.*

The father of the testatrix left her the sum of 4000*l.* for life with power of appointment by will among her children. The testatrix made three wills, one in 1890, by which she left one of her daughters "the sum of 4000*l.*, being the sum left to me by the will of my father"; a second in 1894, by which she left the same daughter 4000*l.* and the residue of her property to the same daughter and one of her sons; and a third in 1895, by which she left all her property to the same daughter:—

Held, that, as the second and third wills both professed to deal with all the property of the testatrix, the second will was revoked by the third, that the general words of bequest in the third will did not revoke the execution of the limited power of appointment by the first will, and that probate should, therefore, be granted of the first and third wills.

In the Goods of Merritt, (1858) 1 Sw. & Tr. 112, and *In the Goods of Joys*, (1860) 4 Sw. & Tr. 214, disapproved. Cadell *v.* Wilcocks Jeune Pres. 21

PROCTOR—Intervention of Queen's Proctor—Costs—Pauper petitioner - - 124
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PROHIBITION—Jurisdiction—Wages—Action in rem—Ship's husband - - 59
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PUBLIC HEALTH—Preventing vaults becoming dangerous to—Faculty—Duty of churchwardens - - - - 63
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PURCHASE-MONEY—Division of—Pre-existing maritime lien—Mortgagees of shares
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QUEEN'S PROCTOR—Intervention of—Costs—Pauper petitioner - - - 124
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RAPE—Divorce Act, 1857 - - - 169
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RECEIVER OF WRECK—Salvage—Jurisdiction—Detention of property - - 206
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RECTOR—Criminal suit against rector for non-repair of chancel—Appeal—Jurisdiction - - - - - 160
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RENUNCIATION—Executor—Retractation 12
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REPAIRS—Criminal suit against rector for non-repair of chancel—Appeal—Jurisdiction - - - - - 160
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REREDOS—Communion table—Chancel platform - - - - - 114
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RETRACTATION—Renunciation—Executor 12
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REVOCATION—Several testamentary papers—Will made in execution of limited power of appointment - - - 21
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SALE—Of ship—Judgment in rem—Warrant of execution—Jurisdiction - - 52
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—— Pre-existing maritime liens—Division of purchase-money - - - 78
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SALVAGE—Award—Principles of assessment—Salving vessels specially equipped 97
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—— Jurisdiction—Receiver of wreck—Detention of property - - - - 206
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—— Towage—Performance prevented by a misfortune beyond control of either party *See* SHIP. 13. 90

SEAMAN—Ship's husband—Wages - 59 *See* SHIP. 7.

SEPARATION — Domicil — Residence within jurisdiction at commencement of suit—Cruelty committed outside jurisdiction *See* DIVORCE. 3. 178

SEPARATION DEED—Dissolution of marriage *See* DIVORCE. 8. 228

SERVICE — Admiralty—Practice — Jurisdiction County court—Agent - - 198 *See* SHIP. 6.

SHIP — *Charterparty — Construction — Bill of Lading—Freight—Cost of Discharge.*

By a clause in a charterparty it was agreed that freight on a cargo of coals shipped by the defendants on the plaintiffs' steamship from Sunderland to Port de Bouc should be paid "at the rate of 9*s.* per ton of 20 cwts. . . . . delivered, or on bill of lading quantity, less 2 per cent., at receiver's option, to be declared in writing before bulk is broken"; and by another clause the consignees were "to effect the discharge of the cargo, steamer paying 1 fr. per ton of 20 cwts." The bill of lading stated that the quantity of coal shipped was 1184 tons. On arrival at Port de Bouc the consignees exercised their option by accepting the cargo at the bill of lading quantity, less 2 per cent., but charged the ship with 1 fr. per ton on the bill of lading quantity without deducting the 2 per cent.:—

Held, by the Divisional Court (Sir F. H. Jeune P. and Gorell Barnes J.), affirming the decision of the county court judge, that the clauses of the charterparty must be read together, and, as the consignees had elected to pay freight on the bill of lading quantity, less 2 per cent., the same deduction of 2 per cent. must be allowed by the defendants in respect of the payment of 1 fr. per ton by the shipowner for the discharge. THE HOLLINSIDE - - - Div. Ct. 131

2. —— *Collision—Compulsory Pilotage—River Tyne—Tyne Pilotage Order Confirmation Act*, 1865 (28 & 29 *Vict. c.* 44), *Sched., ss.* 16, 22—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 604, *sub-s.* 1.

A British steamship, belonging to the defendants, with passengers for Newcastle, from a place in the British Islands, came into collision with the plaintiff's vessel in the Tyne. Neither the master nor the mate of the defendants' steamship held a pilotage certificate for the Tyne district, within which the collision occurred, and the vessel was at the time in charge of a pilot duly licensed by the Tyne Pilotage Commissioners. The pilot was found alone to blame:—

Held, by Gorell Barnes J., that the defendants were not liable for the damage sustained by the plaintiff, as, under s. 604, sub-s. 1, of the Merchant Shipping Act, 1894, pilotage was compulsory, notwithstanding the provisions of s. 16 of the schedule to the Tyne Pilotage Order Confirmation Act, 1865, as interpreted in *The Johann Sverdrup*, (1886) 12 P. D. 43. THE WARSAW Gorell Barnes J. 127

SHIP—*continued.*

3. —— *Necessaries—Bottomry—Marshalling Assets.*

Although the proceeds of ship and freight would be exhausted by the holders of a bottomry bond on ship, freight, and cargo, the Court refused to marshal the assets in favour of a claim for necessaries against ship and freight, on the ground that, the owners of ship and freight being different persons from the owners of cargo, third parties, namely, the cargo owners, would be prejudiced by being, in effect, made to pay the claim of the necessaries men with which they had no concern.

The Edward Oliver, (1867) L. R. 1 A. & E. 379, distinguished. THE CHIOGGIA Gorell Barnes J. 1

4. —— *Pilotage—"Proceeding" to Sea—Proceeding to Dock—Piloting to Landing-stage—"Extra" Services—Mersey Dock Acts Consolidation Act*, 1858 (21 & 22 *Vict. c. xcii.*), *s.* 221.

The Mersey Docks and Harbour Board, as the pilotage authority for the port of Liverpool, has, under s. 221 of the Mersey Dock Acts Consolidation Act, 1858, power to fix, in addition to the ordinary compulsory pilotage rates, a reasonable charge by way of "extra" remuneration for a pilot, licensed by the Board, taking an outward-bound vessel from a dock alongside a landing-stage to complete her loading, as in the case of embarking passengers, their baggage, and the mails.

The Board has also power to fix an additional reasonable charge as "extra" remuneration (besides the charge per day for attendance whilst a vessel is necessarily lying in the river in the course of her navigation inward or outward) in the case of an inward-bound vessel taken by a pilot to a landing-stage to land passengers, baggage, and mails, before discharging the rest of her cargo in dock, including the case of vessels disembarking cattle and sheep at certain landing-stages in pursuance of the orders made under the provisions of the Diseases of Animals Act, 1894.

Semble, that, in the case of an outward-bound vessel, compulsory pilotage will not commence until the vessel proceeds from the stage to sea, and that, in the case of an inward-bound vessel, the employment of the pilot by compulsion of law will cease, or be suspended, as soon as the vessel deviates to the stage from the route which she would otherwise follow to the dock. THE SERVIA—THE CARINTHIA - Gorell Barnes J. 36

5. —— *Practice—Jurisdiction—County Court—Judgment in rem—Warrant of Execution—Sale of Ship—County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *s.* 3, *sub-s.* 3; *ss.* 12, 23—*County Court Rules*, 1892, *r.* 42—*County Court (Admiralty) Forms, No.* 331.

After judgment in favour of the plaintiff, in an action in rem for damage by collision on the Admiralty side of a county court, a warrant of execution issued directing the high bailiff to "levy by distress and sale of the goods and chattels, including the steamship or vessel *Ruby*, of the defendant." Under this warrant the vessel was appraised and sold, but the registrar of shipping refused to register the bill of sale

SHIP—*continued.*
signed by the high bailiff except subject to an outstanding mortgage :—

Held, by Sir F. H. Jeune, President, that the power given to a county court by sub-s. 3 of s. 3 and s. 12 of the County Courts Admiralty Jurisdiction Act, 1868, "to try and determine" an Admiralty cause of damage by collision and enforce the decree "against the person or persons summoned," carried with it the power of rendering the plaintiff's maritime lien effectual against all persons having an interest in the res, and therefore, in order to obtain payment of the debt out of the proceeds, the high bailiff could sell the ship free from incumbrance. THE RUBY
Jeune Pres. 52

6. —— *Practice—Jurisdiction—County Court—Service of Summons—Agent — County Courts Admiralty Jurisdiction Act*, 1868 (31 *&* 32 *Vict. c.* 71), *s.* 21, *sub-s.* 2.

By the County Courts Admiralty Jurisdiction Act, 1868, s. 21, "Proceedings in an Admiralty cause shall be commenced—(2.) in the county court having Admiralty jurisdiction in the district of which the owner of the vessel or property to which the cause relates, or his agent in England, resides. . . . ."

In an action in personam instituted in the City of London Court by the plaintiffs, the owners of a barge damaged by collision with the defendant's steamship within the jurisdiction, the summons described the defendant as "George Smith, of 75, Bothwell Street, Glasgow, the owner of the steamship or vessel *City of Agra*, whose agents in England are Messrs. Montgomerie & Workman, of 36, Gracechurch Street, E.C., within the jurisdiction of this Court." The summons was served on a member of the firm of Montgomerie & Workman; but the *City of Agra* had been lost before the commencement of the action :—

Held, by Gorell Barnes J., that the service of the summons must be set aside, as "agent in England" means a person acting for another person in relation to the vessel or property proceeded against at the time the service of the process is effected, and, at that time, the agency had ceased.

The cases of *The County of Durham*, [1891] P. 1, and *Pugsley* v. *Ropkins*, [1892] 2 Q. B. 184, explained. THE CITY OF AGRA
Gorell Barnes J. 198

7. —— *Practice — Jurisdiction — Wages — Action in rem—Ship's Husband—"Seaman"—Maritime Lien—Prohibition—Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 10—*County Courts Admiralty Jurisdiction Act*, 1868 (31 *&* 32 *Vict. c.* 71), *s.* 3, *sub-s.* 2.

A ship's husband, not being a "seaman" claiming "wages earned by him on board the ship" within the meaning of s. 10 of the Admiralty Court Act, 1861, has no maritime lien upon which he can found an action in rem for "wages" under s. 3, sub-s. 2, of the County Courts Admiralty Jurisdiction Act, 1868. THE RUBY (No. 2) - - - - **Jeune Pres. 59**

8. —— *Practice—"Tender"—County Court — Costs—Final Order—Appeal—County Courts Admiralty Jurisdiction Act*, 1868 (31 *&* 32 *Vict.* **SHIP**—*continued.*
c. 71), *s.* 26—*County Court Rules* (*Admiralty*), 1892, *Order* XXXIX. *B., rr.* 48, 50.

The plaintiffs instituted an Admiralty action in a county court for damages for breach of contract in relation to the use or hire of a ship "in the sum of 30*l.* and costs." The defendants paid into court 17*l.* 10*s.* "in satisfaction of the whole of the plaintiffs' claim herein" together with a denial of liability. The plaintiffs accepted the 17*l.* 10*s.* in satisfaction of the claim in respect of which it was paid in, but their application for taxation, and payment by the defendants, of the costs of the action was refused without leave to appeal :—

Held, by the Divisional Court (Sir F. H. Jeune P. and Gorell Barnes J.), first, that the order refusing the plaintiffs their costs was a final order within the meaning of s. 26 of the County Courts Admiralty Jurisdiction Act, 1868, and, therefore, no leave to appeal was required; secondly, that this being an Admiralty action the special Admiralty rules of the county court, and not the general common law rules, applied, so that the sum paid into court by the defendants was to be treated as by way of "tender" under rule 48 of Order XXXIX. B. of the County Court Rules, 1892, and, on acceptance of the tender, the plaintiffs were entitled, under rule 50, to taxation and payment of their costs. THE VULCAN - - - - **Div. Ct. 222**

9. —— *Sale—Pre-existing Maritime Liens—Division of Purchase-money — Mortgagees of Shares.*

The managing and majority owners of a vessel, as vendors, handed over the possession of her to a Scottish firm under a contract of sale by which the firm were to become owners of the shares in the vessel in proportion to the instalments of the purchase-money paid. The firm paid a sum on account of the purchase-money against which eight shares in the vessel were transferred to them. These shares the firm mortgaged. In working the vessel the firm incurred liabilities which, in an action in rem by the master, were held to have created maritime liens on her (*The Ripon City*, [1897] P. 226), and, after entering into an onerous charter for the vessel, the firm became bankrupt. The vendors resumed possession of the vessel, gave bail in the above-mentioned action, paid the amount subsequently adjudged to be due, paid a sum to cancel the charter, repaired the vessel, settled with the minority owners, and, with the acquiescence of the mortgagees of the eight shares, sold her to a foreign purchaser. In an action by the mortgagees against the vendors in respect of the distribution of the proceeds of the sale :—

Held, by Sir F. H. Jeune, President, that as against the mortgagees the vendors could not, before dividing the purchase-money, deduct a proportion of (1.) the sum paid to clear off the maritime liens, as there had been no request from the mortgagees and they were not at the time of the payment in possession; (2.) the sum paid to cancel the charter, as the mortgagees, not being in possession, were not liable for expenses connected with the working of the ship; (3.) the

SHIP—*continued.*

cost of repairs, as it was not proved that they had been executed in pursuance of the agreement for the sale of the vessel to the foreign purchaser.

Johnson v. *Royal Mail Steam Packet Co.*, (1867) L. R. 3 C. P. 38, and *The Orchis*, (1889) 15 P. D. 38, distinguished. THE RIPON CITY (*otherwise* THE SILVIA) - **Jeune Pres. 78**

10. —— *Salvage — Jurisdiction—Receiver of Wreck—Detention of Property—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 546, 552.

By s. 546 of the Merchant Shipping Act, 1894, "Where any vessel is . . . . in distress at any place on or near the coasts of the United Kingdom . . . . and services are rendered by any person in assisting that vessel . . . . there shall be payable to the salvor by the owner of the vessel . . . . a reasonable amount of salvage to be determined in case of dispute in manner hereinafter mentioned."

By. s. 552, "Where salvage is due to any person under this Act, the receiver shall—(*a*) if the salvage is due in respect of services rendered in assisting any vessel or in saving life therefrom . . . . detain the vessel . . . . until payment is made for salvage . . . ."

A British steamship, belonging to the plaintiffs, with cargo from and to a Continental port, was in the English Channel, in distress, for want of fuel, twenty miles off the coast. A British steam-tug towed her into Plymouth, and, at the request of the master of the tug, the defendant, receiver of wreck at that port, detained the plaintiffs' vessel two days pending the production of satisfactory bail to answer a claim for salvage.

In an action for damages for the illegal arrest of the vessel:—

Held, by Gorell Barnes J., that the defendant was entitled to judgment, as the words in s. 552, "salvage . . . . due under this Act," are not confined to salvage expressly made payable under the Act, but include salvage which may be awarded by the Courts mentioned in the Act whose jurisdiction is conferred or recognised by it.

Semble, that the words "near the coasts of the United Kingdom" in s. 546 are restricted to the territorial limit. THE FULHAM

Gorell Barnes J. 206

11. —— *Salvage — Salving Vessels specially equipped—Salved Vessel saved from certain Total Loss — Principles of Assessment of Award — Amount.*

After a collision between two steamships, outside Gibraltar Bay, one of them commenced to settle down. Her passengers and crew were transferred to the other vessel, and, her distress being notified from the signal station, two steamers belonging to the plaintiffs, of the value of 22,000*l.* and 20,000*l.* respectively, specially built, maintained, and equipped, with steam up night and day, for salvage purposes on the basis of no cure no pay, came out of the bay to the assistance of the sinking vessel. By lashing themselves one on each side of her, they succeeded in keeping her up for two hours until they had beached her in Getares Bay, where the holes were temporarily patched by the divers carried by the salving steamers, and by means of

SHIP—*continued.*

their powerful pumping-gear the water in the vessel was lessened until she floated, when she was towed to Gibraltar. The whole operations lasted three days, with the result that, by the admission of the defendant owners of ship, freight, and cargo, this property, of the agreed value, as salved, of 76,596*l.*, was saved from certain total loss:—

Held, by the Court of Appeal (A. L. Smith, Chitty, and Collins L.JJ.), affirming the decision of Gorell Barnes J., and on the principles laid down by Lord Stowell in *The William Beckford*, (1801) 3 C. Rob. 355, and of Sir Charles Butt in *The Envoy*, (1888) (not reported), that it was to the general interests of navigation that the Court should by liberal rewards encourage the maintenance of powerful and efficient steamships kept in constant readiness to assist vessels in distress, and that, considering this special element, and the condition in which the salved vessel was at the time, together with the value of the salved and salving property, the skill displayed by the salvors, and the serious risk to their lives and property, the owners, masters, and crews of the two steamers were entitled, in equal moieties, to an award of 19,000*l.* THE GLENGYLE **C. A. 97**

12. —— *Salvage* (*Life*) — *Foreign Vessel—Jurisdiction—Services "wholly or in part within British waters"—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 544, *sub-s.* 1.

By s. 544, sub-s. 1, of the Merchant Shipping Act, 1894, "Where services are rendered wholly or in part within British waters in saving life from any . . . . foreign vessel . . . . there shall be payable to the salvor by the owner of the vessel, cargo, or apparel saved, a reasonable amount of salvage. . . ."

A British steam-trawler whilst on a fishing voyage in the North Sea, and about ninety miles north-east of the Spurn, fell in with a waterlogged Norwegian barque. After some difficulty the trawler rescued the crew of the barque, and the next day landed them at Hull. The barque was subsequently saved by other salvors, and brought into Grimsby. In an action for life salvage by the owners, master, and crew of the trawler, it was contended by the defendants, the owners of the barque and of her cargo, that there was no jurisdiction under the statute to make an award:—

Held, by Sir F. H. Jeune, President, that the plaintiffs were entitled to life salvage, as the salving vessel, in the course of effecting the salvage service, was within British waters, and, therefore, the services were rendered "in part within British waters" within the meaning of the statute. THE PACIFIC - **Jeune Pres. 170**

13. —— *Towage—Contract, Construction of—Complete Performance prevented by a Misfortune beyond the Control of either Party—Subsequent Salvage.*

The plaintiffs, tug-owners, contracted to tow the defendants' vessel from Kingroad in the River Severn to Sharpness Dock for a fixed sum, but when near their destination, owing to a fog and without anybody being in fault, the vessel stranded on a rock, and could not be got off:—

Held, by Sir F. H. Jeune, President, that the

SHIP—*continued.*
contract was indivisible, and, not having been fulfilled, the plaintiffs were not entitled to recover on a quantum meruit for any portion of the towage.

Appleby v. *Myers*, (1867) L. R. 2 C. P. 651, followed.

After the stranding and failure of the attempt to get the vessel off, the tugs were ordered by the master of the vessel to keep her where she was so as to prevent her drifting up the river and sinking in deep water or doing damage. These orders the tugs obeyed; and in the result the vessel was sold where she lay, but the greater part of the cargo of timber being taken off in lighters, the freight was earned by the shipowner:—

Held, that this was a salvage service, and on a total value of 2724*l.* the owners, masters, and crews of the three tugs engaged were awarded 370*l.* THE MADRAS - - **Jeune Pres. 90**

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